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OLDER WORKERS BENEFIT PROTECTION ACT

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON
LABOR AND HUMAN RESOURCES

AND THE

SPECIAL COMMITTEE ON AGING

UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 1511

TO AMEND THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 TO CLARIFY THE PROTECTION GIVEN TO OLDER INDIVIDUALS IN REGARD TO EMPLOYEE BENEFIT PLANS, AND FOR OTHER PURPOSES

SEPTEMBER 27, 1989
WASHINGTON, DC

Senate Special Committee on Aging
Serial No. 101-308

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OLDER WORKERS BENEFIT PROTECTION ACT

WEDNESDAY, SEPTEMBER 27, 1989

U.S. SENATE,
SUBCOMMITTEE ON LABOR, OF THE COMMITTEE ON LABOR AND
HUMAN RESOURCES, AND SPECIAL COMMITTEE ON AGING,
Washington, DC.

The subcommittee and committee met in joint session, pursuant to notice, at 10:30 a.m., in room 628 Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum, Pryor, Jeffords, Heinz, Glenn, Graham, Grassley, Cohen, Warner, and Kassebaum.

Senator **METZENBAUM**. I call this meeting to order.

This is a joint hearing of the Subcommittee on Labor of the Labor and Human Resources Committee and the Special Committee on Aging of the United States Senate.

Today's hearing addresses proposed legislation aimed at protecting older workers from discrimination in the area of employee benefits. The Age Discrimination in Employment Act is this Nation's fundamental civil rights law safeguarding older Americans in the workplace.

The notion that the ADEA permits employers to discriminate intentionally against older workers by denying them basic employee benefits solely on the basis of their age seems preposterous. But this past June, in a case called *Public Employees Retirement System of Ohio v. Betts*, the Supreme Court interpreted the ADEA to permit precisely this type of arbitrary age discrimination.

The *Betts* decision was profoundly wrong. The Supreme Court callously disregarded the wishes of Congress and recklessly turned its back on the regulations enforced by six presidential administrations over the past 20 years.

Further, the Court's decision runs counter to the judgment of every United States Court of Appeals that has considered this issue.

What happened to June Betts, the 61-year-old plaintiff in the *Betts* case, was a tragedy and a disgrace. A woman who worked as hard as she could for as long as she could is now disabled and destitute. She has been denied disability benefits solely because of her age.

But what happened to June Betts is not unique. Every day, older workers, many of whom are the most loyal, most experienced, most dedicated workers on the job, are treated like second-class citizens and denied benefits simply because of their age.

I cannot conceive that Congress intended to sanction such blatant discrimination under the ADEA. The Older Workers Benefit Protection Act, S. 1511, will make clear once and for all that June Betts and millions like her are protected from discrimination in employee benefits. The bill restores the bipartisan pre-*Betts* understanding of the employee benefit provisions of the ADEA by reaffirming the "equal benefit or equal cost" principle.

This principle reflects common sense as well as congressional intent. An employer must provide older workers with benefits at least equal to those provided for younger workers unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one. Because age-related cost differences do exist for some employee benefits such as life insurance, employers who demonstrate such a cost differential may comply with the ADEA by expending equal amounts for the benefit per employee.

The equal benefit or equal cost rule is fair to employees because it encourages employers to provide equal benefits for older workers. It also is fair to employers because it gives them the flexibility to provide unequal benefits if they have sufficient age-based cost justifications.

We will hear testimony today from experts on both sides of this legislation, and I look forward to the dialogue on the important and complex issues of statutory interpretation and public policy. But assertions of complexity should not be allowed to obscure the urgent need for legislation. Congress must act promptly so that older workers receive the employee benefit protections which I believe Congress always intended to give them and to which they are surely entitled.

[The prepared statement of Senator Metzenbaum follows:]

PREPARED STATEMENT OF SENATOR HOWARD M. METZENBAUM

Today's hearing addresses proposed legislation aimed at protecting older workers from discrimination in the area of employee benefits.

The Age Discrimination in Employment Act (ADEA) is this Nation's fundamental civil rights law safeguarding older Americans in the workplace. The notion that the ADEA permits employers to discriminate intentionally against older workers by denying them basic employee benefits solely on the basis of their age seems preposterous. But this past June, in a case called *Public Employees Retirement System of Ohio v. Betts*, the Supreme Court interpreted the ADEA to permit precisely this type of arbitrary age discrimination.

The *Betts* decision was profoundly wrong. The Supreme Court callously disregarded the wishes of Congress and recklessly turned its back on the regulations enforced by six Presidential Administrations over the past 20 years. Further, the Court's decision runs counter to the judgment of every United States Court of Appeals that has considered this issue.

What happened to June Betts, the 61-year-old plaintiff in the *Betts* case, was a tragedy and a disgrace. A woman who worked as hard as she could for as long as she could is now disabled and destitute. She has been denied disability benefits solely because of her age. But what happened to June Betts is not unique. Every day older workers, many of whom are the most loyal, most experienced and most dedicated workers on the job, are treated like second-class citizens and denied benefits simply because of their age. I cannot conceive that Congress intended to sanction such blatant discrimination under the ADEA. The Older Workers Benefit Protection Act, S. 1511, will make clear once and for all that June Betts and millions like her are protected from discrimination in employee benefits.

The bill restores the bipartisan pre-*Betts* understanding of the employee benefit provisions of the ADEA by reaffirming the "equal benefit or equal cost" principle.

This principle reflects common sense as well as Congressional intent. An employer must provide older workers with benefits at least equal to those provided for younger workers, unless the employer can prove that the cost of providing an equal benefit is greater for an older worker than for a younger one. Because age-related cost differences do exist for some employee benefits (such as life insurance), employers who demonstrate such a cost differential may comply with the ADEA by expending equal amounts for the benefit per employee. This "equal benefit or equal cost" rule is fair to employees because it encourages employers to provide equal benefits for older workers. It also is fair to employers because it gives them the flexibility to provide unequal benefits if they have sufficient age-based cost justifications.

We will hear testimony today from experts on both sides of this legislation. I look forward to the dialogue on the important and complex issues of statutory interpretation and public policy. But assertions of complexity should not be allowed to obscure the urgent need for legislation. Congress must act promptly so that millions of older Americans receive the employee benefit protections which I believe Congress always intended to give them and to which they are surely entitled.

Senator METZENBAUM. I had earlier stated that this was a joint hearing of the subcommittee that I chair and the Special Committee on Aging of the United States Senate which is chaired by Senator David Pryor.

Now, no man in the United States Senate nor woman has given more of himself or has more strongly addressed himself to these issues protecting our senior citizens in this country than my distinguished colleague from Arkansas, and I am very happy to share this joint hearing with him: Senator David Pryor.

Senator Pryor.

Senator PRYOR. Thank you, Senator Metzenbaum. And thank you for your very, very kind words.

Senator Metzenbaum, I was a little late in arriving, and I think Senator Jeffords was here first and maybe Senators Grassley and Cohen. I would be glad to yield at this point to them and then I will follow on after they complete their remarks.

Senator METZENBAUM. They are all pointing to you.

Senator PRYOR. Well, let me say, Mr. Chairman, what a great opportunity it is to work with you on this matter and to work with several of our colleagues who are at this table this morning.

We have an extremely critical matter before us that affects thousands and perhaps millions of older individuals in our work force.

Let me say to Mrs. Betts that in response to your mother's case we have introduced S. 1511. We have as cosponsors today Senators Jeffords, Metzenbaum, Kennedy, DeConcini, Bumpers, Levin and Cohen. The Older Workers Benefit Protection Act I think is going to gain momentum, especially after this hearing. I don't think that this legislation will settle any old disputes. I don't think that it's going to create any new disputes. What we are trying to do is to basically restore by restatement the rules, regulations and law regarding the Age Discrimination in Employment Act's application to employee benefits.

Let me plead with my colleagues—and I know Senator Metzenbaum joins me in this plea—that time is of the essence. Today the EEOC has some 30 cases pending and basically awaiting the decision of Congress on this legislation. Especially since this particular legislative session will soon grind to a close, I believe we must act quickly.

And I would like to ask, Mr. Chairman, that the full body of my statement be placed in the record at the appropriate point.

I think we can see the interest in this issue by the large number of Senators attending. We thank them for their attendance and appreciate them coming. We look forward to their statements and also to the statements of our witnesses.

Senator **Metzenbaum**. Without objection, the entire statement will be included in the record.

[The prepared statement of Senator Pryor follows:]

Prepared statement of Senator David Pryor

I want to welcome everyone to this joint hearing of the Special Committee on Aging and the Labor and Human Resources Subcommittee on Labor. Today we will examine the United States Supreme Court's recent decision in *Public Employees Retirement System of Ohio v. Betts* and its potential effect on the employee benefits of older workers. We will also look at current legislative efforts to correct what many believe is a misguided decision by the Court.

In the *Betts* case, the Supreme Court rejected the strong arguments of a woman who received $158 per month in retirement benefits instead of $350 per month simply because she was aged 61 rather than 60 or under when she became permanently disabled and was forced to retire. The Court also rejected a friend of the court brief submitted by the administration on behalf of Mrs. Betts. Instead, the Court struck down an Equal Employment Opportunity Commission (EEOC) interpretation of the employee benefits exception provision of the Age Discrimination in Employment Act (ADEA), known as section 4(f)(2), which had been accepted for 20 years.

By doing so, the Court has cleared the way for employers to discriminate without fear against older workers in the area of employee benefits. In the wake of the *Betts* decision, older workers who had counted on employee benefits to protect them against the crippling cost of health care and to provide them with secure retirements can no longer be certain of these cushions for the future.

In response, Senators Jeffords, Metzenbaum, Kennedy, DeConcini, Bumpers and Cohen have joined me in sponsoring S. 1511, the Older Workers Benefit Protection Act. This bill is narrowly drafted to the specific purpose of correcting the *Betts* decision and returning to the regulations interpreting section 4(f)(2), which had been accepted for two decades. The bill does not settle any old disputes and it does not create any new ones. Instead, it merely returns this area of the law to the status quo before *Betts*.

I would emphasize to my colleagues that we must not only act carefully on this issue, but also quickly. As we will hear shortly, the EEOC has over 30 cases pending which could be adversely affected by *Betts*, and I am sure that numerous other benefit discrimination cases brought by individuals may also face dismissal.

I am here to listen and to learn. I want all of the witnesses today to help us make S. 1511 a better bill; one which will protect the rights of older workers and be fair to employers.

Unfortunately, however, too many in the business community have chosen to spend their time discrediting this bill rather than contributing constructive suggestions. It is apparent that these business groups have taken the position that the Supreme Court's decision in *Betts* should be allowed to stand. The premise of this position is that Congress never intended the Age Discrimination in Employment Act to apply to employee benefits, but the legislative history of the ADEA suggests a different conclusion.

It is very difficult for me to believe that congressional intent in enacting the 4(f)(2) exception to the ADEA was to sanction age discrimination in employee benefits. Instead, I believe, and the legislative history suggests, that the purpose of 4(f)(2) was to take account of the age sensitivity in the cost of some benefits and to allow employers to make adjustments in their benefit plans because of age based cost considerations without violating the ADEA.

I know that we will hear both endorsements and criticisms of S. 1511 today. However, regardless of the witnesses' positions, I hope that we can count on them to also offer helpful suggestions on how to strengthen the legislation before us and make it more fair and responsive to employees and employers alike.

I want to thank all of the cosponsors of S. 1511, and in particular, I want to thank Senators Jeffords, Metzenbaum and Kennedy for their valuable help in drafting the bill. I also want to thank Senators Domenici and Grassley for their help and input in the drafting sessions and express my hope that they will soon become cosponsors of this important legislation. Finally, I want to thank Chairman Roybal of the House Select Committee on Aging for his participation and for introducing H.R. 3200, the companion bill of S. 1511.

I look forward to the testimony of the witnesses and to a healthy and helpful discussion of this important issue.

Senator **Metzenbaum**. Senator Jeffords.

Senator **Jeffords**. Thank you, Mr. Chairman. I am pleased to be here today with you, and I am especially pleased that the hearings are being held in a timely manner. I think it's incredibly important that we make decisions on this bill immediately.

We are here today also to fulfill the promise made at the introduction of the Older Workers Benefit Protection Act. That promise was that this measure would receive a prompt and substantial hearing early in the fall term, and we have assembled an impressive panel of witnesses to be heard from today to enlighten us on the issues which must be confronted in this legislation.

The express purpose of both bills is reversing the *Betts* holding that an employee benefit plan is not covered by ADEA unless the plan is subterfuge for discrimination in the other aspects of the employment relationship. Whether Congress intended to exempt benefits from ADEA coverage is one of the key questions to be answered. We will probably hear something about that today from the witnesses.

Another important question relates to the EEOC regulation struck down in *Betts*. Both bills would reinstate and give statutory force to the EEOC regulation. The question arises whether there are policy, procedural or fairness reasons why Congress should not do this. The regulations have existed for a number of years. During that time employee benefit policy has been formulated with the full knowledge of these regulations. Thus returning to the status quo prior to *Betts* should create no hardship, because benefit planners always knew of the regulations and had longstanding opportunity to comply with them.

However, since introduction, we have heard from some interested parties that our bills do not reflect the reality of benefit practices and that they will upset the benefit's apple cart.

Obviously, this is not a simple issue. There are serious policy questions to be answered, including most particularly the issue of benefit integration.

All of this reaffirms the need for a full and open discussion on the relationship between the ADEA and employee benefits. The holding of substantial hearings at which all interested parties fully air their positions is the only rational way to proceed, and that is why we are gathered here today.

Thank you, Mr. Chairman.

Senator **Metzenbaum**. Thank you, Senator Jeffords.

Senator Heinz, we are happy to have you with this morning.

Senator **Heinz**. Mr. Chairman, thank you. I would be happy to yield to my colleagues who were here first.

Senator **Metzenbaum**. I was not sure who was here first, and that's the reason I started going down the line.

Senator **Heinz**. Well, both of them were, I know that. But since they insist, I will be brief.

Let me ask unanimous consent that my full statement appear in the record in full.

Senator Metzenbaum. Without objection, it will be.

Senator Heinz. If I may take Senator Jeffords' microphone.

Mr. Chairman, I wasn't here in the Congress in 1967, when we passed the Age Discrimination in Employment Act, but I was privileged to be a member of this body, to become a member of this body in 1976, and the first bill I introduced was a bill to ban age discrimination.

Subsequently, Senator Javits prevailed in his legislation to increase the age at which we could then discriminate, from 65 to age 70. And when I was privileged to be the chairman of this committee from 1981 through 1986, on behalf of this committee and many of its members and many other people in the Senate, I was privileged to introduce the legislation that finally did outlaw age discrimination.

And I might add I express my thanks to all the members of this committee, and most particularly to have a chance here to thank Howard Metzenbaum for some extraordinary work that he did with me in making sure that we got rid of every last single objection to the taking up of that legislation, including one potential objection by somebody who is now vice president of the United States.

And thanks to that we were able to enact legislation literally unanimously in the U.S. Senate, putting the Senate 100 percent on record against age discrimination in employment and, of course, against mandatory retirement in any form.

And I mention that because I think it is important for people who come before this committee to understand what the predisposition of the Senate is. We are strongly and institutionally opposed to age discrimination, and I am not saying that because there are Members of the Senate over 65 or 70. There may be one or two, but I don't see any here today. [Laughter.]

Senator Heinz. Quite seriously, the Supreme Court's *Betts* decision—and we are going to hear from the daughter of plaintiff here in a moment—clearly makes it much more difficult for employees to challenge benefit plans that they believe discriminate against older workers. In the past, the EEOC and the Department of Labor have interpreted the ADEA to mean that employers discriminating on the basis of age against older workers and their employee benefits must justify their plan on a cost basis.

And undermining more than 20 years of protection under the ADEA the Supreme Court ruling could result in discrimination in older worker health, disability, life insurance, vacation and severance benefits.

I clearly think we need to take action and that that action needs to be aimed at restoring the pre-*Betts* regimen to the status of law.

I also think that it is in the interests of American business to do that. American business will increasingly need older workers in the future. The biological clock or the population clock, if you will, has already been set. It's preset. And what it says is that, for all intents and purposes, the number of workers in our work force is largely fixed. The number of new workers entering is much smaller than heretofore.

So I look forward today, Mr. Chairman, to the testimony of our many witnesses. I am pleased to join with you and Senator Pryor and Senator Jeffords to carve out effective legislation that is the true intent of the ADEA. There are some issues that we want to get into on how we handle certain kinds of plans, early retirement incentive plans, the issue of retroactivity. But whether or not the legislation that any of us has proposed goes beyond pre-*Betts*, I think we will settle those issues very thoroughly and constructively here.

I commend you on holding this hearing today, Mr. Chairman.

[The prepared statement of Senator Heinz follows:]

PREPARED STATEMENT OF SENATOR JOHN HEINZ

I would like to commend Chairman Metzenbaum and Chairman Pryor for convening this important hearing to examine how the scope of the Age Discrimination in Employment Act (ADEA) has changed following the June 23, 1989 United States Supreme Court decision in *Public Employees Retirement Systems of Ohio v. Betts.* I am deeply concerned that the *Betts* decision will unravel the cloak of protections for older workers that Congress has spent the last two decades weaving.

We took the first stitch in 1967, when the Age Discrimination in Employment Act (ADEA) established that age discrimination, like discrimination based upon race, religion, or sex, is inherently contrary to the principle of individual merit. In 1978, we extended the age for protection from 65 to 70. Finally, in 1985, I introduced legislation to eliminate mandatory retirement for all ages. In passing this legislation, Congress reinforced the rights of all senior citizens to remain active contributors in the American economy.

The *Betts* decision, written by Justice Anthony M. Kennedy, ruled that employee benefit plans were no longer protected under the Age Discrimination and Employment Act (ADEA). The 7 to 2 ruling, coming in the case of a challenge to Ohio's retirement plan for public employees, substantially revises the way Federal agencies have interpreted the ADEA. This decision makes it much more difficult for employees to challenge benefit plans that they believe discriminate against older workers.

In the past, the Equal Employment Opportunity Commission (EEOC) and the Department of Labor have interpreted the ADEA to mean that employers discriminating on the basis of age against older workers in the area of employee benefits must justify their plan on a cost basis. Undermining more than 20 years of protection under the ADEA, the Supreme Court's ruling could result in discrimination in older workers health, disability, life insurance, vacation, and severance benefits.

In July, just 2 weeks after the Supreme Court decision, I introduced legislation to amend the ADEA to remedy the affects of the *Betts* decision. The intent of my legislation is to restore the law to its status before the Supreme Court decision by clarifying that employee benefits are protected under the ADEA, and codifying the EEOC regulations relating to cost-justification of benefits. Furthermore, the legislation would place the burden of proof on the employer to justify any variations in coverage based on age. Benefit plans created prior to the ADEA would still have to conform to the Act.

In no way is my legislation intended to alter long-standing practices of providing employee benefits. Yet, several industry organizations and businesses have expressed serious reservations about overturning the *Betts* decision. These concerns should be addressed as we consider legislation. Specifically, does the proposed legislation go beyond "pre*Betts*" law? How will the legislation impact the provision of early retirement incentive plans? Should the legislation be retroactive?

American business increasingly will need older workers in the future. As the biological clock advances on this Nation's workforce, the pool of younger workers will shrink. We must take steps now to eliminate policies which discriminate against older workers, and develop strategies which will assist businesses to encourage more workers to remain productive. Congress must send a clear message that it will reject all barriers to older workers' full and equitable participation in the work force.

I look forward to the expert witnesses who will present differing opinions today. I will be pleased to work with Senator Metzenbaum, Senator Pryor, and Senator Jeffords to carve out effective legislation that is true to the intent of the ADEA.

Senator METZENBAUM. Thank you, Senator Heinz.

Senator Heinz, the ranking member of the Committee on Aging, we are very happy to have you here with us this morning. And I want to say that over a period of years you have made a record for yourself in speaking out for senior citizens, and I am happy to be working with you again in this instance.

Senator Cohen, we are delighted to have you. I know you are also a member of the Aging Committee. I am very pleased that you are here with us this morning, and we would be very happy to hear from you. And if I owe you an apology for not having recognized you as having come in earlier, I make that apology.

Senator COHEN. Thank you, Mr. Chairman. I believe in the seniority rule, especially in this committee. [Laughter.]

Mr. Chairman, there was an interesting article in today's Washington Post in the Style section. It was a piece done by Henry Allen on Frank Fukayama and on a major turbulent discussion taking place today on a philosophical matter called "Endism," in which Mr. Fukayama wrote about the end of conflict between the forces of dark and light, evil and good. And I think the word endism is something that we thought we had applied to racism, sexism, and ageism. And yet I think what has happened with the Supreme Court decision is that the Court has reversed, overturned the clear congressional intent in the passing of the Age Discrimination in Employment Act in the first place.

So we may have endism as far as that philosophical Hegelian conflict that is described in today's *Washington Post*, we do not have an end to ageism if the Supreme Court's *Betts* decision is allowed to stand.

So I am hoping that we can take action. As Senator Pryor said, we want to restore by restatement the original intent of the legislation, but we also need to be somewhat cautious. I notice in the CRS analysis of the legislation itself that we may want to change the words "at least equal," as contained in the proposed Older Workers Benefit Protection Act to perhaps something like "no less than," because we want to accommodate situations in which the employers may want to provide more to an older employee as opposed to just equal to.

But let me just say a couple of other words. I have two other committees that are meeting now and I am also supposed to be partaking in the debate on the floor, and I may not have a chance later to say a few words about UNUM, which is the Nation's largest disability insurance carrier and an excellent example of a company that has done well by doing good.

Not only is UNUM concerned about the rights of older workers as demonstrated by the presence today of Mr. Kevin McCarthy, who is the vice president of the company, but it is also a model employer itself. Just last week it was listed by Working Mother magazine as one of the 60 U.S. companies with exemplary benefits and personnel policies for working mothers.

I know that we are going to have important testimony from Mr. McCarthy, but I may or may not be here when his turn comes. I have a fuller statement I would like to insert in the record. In any event, I want to welcome Mr. McCarthy here today. I am sure the committee will benefit from his testimony.

[The prepared statement of Senator Cohen follows:]

PREPARED STATEMENT OF SENATOR WILLIAM S. COHEN

I commend the Chairmen of the Special Committee on Aging and of the Labor and Human Resources Subcommittee on Labor for convening this hearing today. The Congress needs to consider the questions raised by the Supreme Court's recent decision in *Public Employees Retirement System of Ohio v. Betts* in order to determine the best means of preserving the protections of the Age Discrimination in Employment Act (ADEA) as they pertain to employee benefits. I am especially pleased that the Chairmen have invited Mr. Kevin McCarthy, Second Vice President for Long-Term Disability Products of the UNUM Corporation—a company that has its headquarters in my state—to testify on legislation proposed to restore ADEA employee benefit protections to their status before the Supreme Court ruling in *Betts*.

UNUM is the Nation's largest disability insurance carrier and an excellent example of a company that has done well by doing good. Not only is UNUM concerned about the rights of older workers, as demonstrated by Mr. McCarthy's representation today, but UNUM is also a model employer itself. Just last week UNUM was listed by *Working Mother* magazine as one of 60 U.S. companies with exemplary benefits and personnel policies for working mothers.

UNUM is also an innovator in the field of long-term care insurance. This past spring, UNUM unveiled a new long-term care insurance policy developed in cooperation with the American Association of Homes for the Aging, and Lifeplans, Inc. This new product—with which I am sure Mr. McCarthy is somewhat familiar—is based on a disability model, in that benefits are triggered by assessment of functional disability rather than consumption of medical services or institutionalization. The new policies were developed with an emphasis on keeping beneficiaries in the community and not in the nursing home.

If I might suggest, Mr. Chairman, perhaps Mr. McCarthy would be willing to come back before the Aging Committee on another day to tell us more about UNUM's new product.

Mr. Chairman, I am very pleased that UNUM has taken an interest in legislation to protect older workers from discrimination in employee benefits and I am very pleased to see that you have welcomed UNUM's consultation. From my work with them I know that their expertise will be most helpful. Thank you for giving me the opportunity to introduce Mr. McCarthy.

Senator METZENBAUM. Thank you, Senator Cohen. We are very happy to be working with you in connection with this matter.

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I believe this hearing is on a most important topic, and I think too many hearings that we have probably do not lend much to additional understanding of the issues, but I believe, based upon what happened in the other body in that hearing, that the hearing that we are going to have today is going to play a very important role in reaching a legislative compromise on this issue. And judging by the diversity and quality of the viewpoints represented among the witnesses today, it is going to help us with this complicated issue.

Now, I have supported for many years the Age Discrimination in Employment Act of 1967 and have authored two major amendments to keep it current to the needs that existed then and must be preserved. Therefore, I noted with interest the recent decision of the *Betts* case handed down in June of this year.

The chairmen, the two chairmen, have reviewed that decision, and I don't want to repeat what they have so well described.

I do want to say, Mr. Chairman, that in the aftermath of the *Betts* decision, it is entirely appropriate that Congress review Federal policy with respect to age discrimination in employee benefits. And I do not see as an end product the maintenance of the status quo from that *June Betts* decision, I see us doing something. I don't entirely have my mind made up to what we do, but I intend to be a part of that process and to help reach a solution, not be standing in the way.

I understand that some of those interested in this issue believe that employers can now decide to provide no benefits to workers over 40 or could deny or reduce those benefits without justification. Now, if this is true, it is surely not an outcome that we can accept.

I do not know whether either of these two bills before us represents the best way to create a nondiscriminatory policy, but I do know that I do not believe that the benefits of older workers relative to younger workers should depend on the goodwill of employers or the vagaries of the marketplace.

However, at this point I am impressed with the complexity of the employee benefit area and with the fact that the parties representing different sides of the issues hardly seem to agree on even the most basic aspects of those issues.

In testimony before committees in the other body, very expert witnesses in impressive testimony, argued that law and regulation with respect to age discrimination in employee benefits has been settled for 20 years. Equally expert witnesses in equally impressive testimony argued exactly the opposite, that law and administrative usage has been anything but settled.

At the same hearing knowledgeable witnesses argued that employee benefits have been virtually universally developed in light of the Equal Employment Opportunity Commission's Interpretive Bulletin. Knowledgeable witnesses on the other side of the issue argue that the Interpretive Bulletin bears no relationship at all to the reality of benefit plans.

While one side argues that immediate correction of that court decision is imperative lest employers begin to butcher the benefits of older workers, the other side argues that passage of bills designed to protect older workers' benefits will have exactly the opposite effect.

Even when we take into consideration the common tendency of interested parties to exaggerate and cry wolf, it is clear that we are dealing with a matter on which we need to take considerable care. Therefore, I think we need to proceed with caution but we need to proceed and develop legislation.

On that note, I want to conclude, Mr. Chairman, and will simply observe that your bill and that of Senator Heinz are useful starting points for discussion on this issue and that this hearing should help us to sort out some of the questions raised by the court's decision. I am sure that our chairmen will see that that is done, and I want them to see that that is done.

[The prepared statement of Senator Grassley follows:]

Prepared statement of Senator Charles E. Grassley

Mr. Chairman, I believe this is a hearing on a most important topic. Judging by the diversity and quality of the viewpoints represented among the witnesses today, it will make an important contribution to the understanding of this complicated issue.

I have supported for many years the Age Discrimination in Employment Act of 1967. And I have been involved, as you know, in the passage of two of the small number of amendments to the Act signed into law since the original law was enacted.

Therefore, I noted with interest the recent decision of the Supreme Court in *Public Employees Retirement System v. Betts*, handed down on June 23, 1989.

The Chairman has reviewed that decision and I do not want to repeat what he so well described.

I do want to say, Mr. Chairman, that, in the aftermath of the *Betts* decision, it is entirely appropriate that Congress review Federal policy with respect to age discrimination in employee benefits.

I understand that some of those interested in this issue believe that employers could now decide to provide no benefits to workers over 40, or could deny or reduce those benefits without justification.

If this is true, it is surely not an outcome we can accept. I do not know whether S. 1511 or S. 1293 represents the best way to create a non-discriminatory policy. But I do know that I do not believe that the benefits of older workers relative to younger workers should depend on the good will of employers or vagaries of the marketplace.

However, at this point I am impressed with the complexity of the employee benefit area, and with the fact that the parties representing different sides of the issues hardly seem to agree on the most basic aspects of those issues.

In testimony before committees in the House of Representatives, very expert witnesses, in impressive testimony, argued that law and regulation with respect to age discrimination in employee benefits has been settled for twenty years. Equally expert witnesses in equally impressive testimony argued exactly the opposite—that law and administrative usage has been anything but settled.

At the same hearing, knowledgeable witnesses argued that employee benefits have been virtually universally developed in light of the Equal Employment Opportunity Commission's Interpretive Bulletin, while knowledgeable witnesses on the other side of the issue argue that the Interpretive Bulletin bears no relation at all to the reality of benefit plans.

While one side argues that immediate correction of the Court's *Betts* decision is imperative lest employers begin to butcher the benefits of older workers, the other side argues that passage of the bills designed to protect older workers' benefits will have exactly the opposite effect.

Even when we take into consideration the common tendency of interested parties to exaggerate and cry wolf, it is clear that we are dealing with a matter on which we need to take considerable care.

Therefore, I think we need to proceed with caution. On that note I want to conclude, Mr. Chairman, and will simply observe that your bill, and that of Senator Heinz, are useful starting points for our discussions on this issue, and that this hearing should help us sort out some of the questions raised by the Court's decision.

Senator METZENBAUM. Thank you very much, Senator Grassley. We look forward to working with you.

Not wishing to be accused of sex discrimination in a hearing having to do with age discrimination, but based solely upon the time of arrival, I hope that my colleague from Kansas will understand when I call upon the distinguished chairman of the Committee on Governmental Affairs, a member of the Aging Committee, the senior Senator from my State, Senator John Glenn.

Senator GLENN. Thank you, Mr. Chairman.

I want to commend both chairmen for having this hearing today on the Older Workers Benefit Protection Act, and I also wanted to take this opportunity to be added as a cosponsor of this legislation also.

Senator METZENBAUM. Good.

Senator GLENN. This would restore the rights—and I stress, rights—of millions of older workers to employee benefits, benefits such as health and disability protection and pensions. Now, their rights are in jeopardy, and I think we have rather a rare situation here: It is Congress trying to take action before the wreck occurs.

We have had this legislation in effect for a number of years. The Supreme Court put it in jeopardy in the June 23rd decision. And basically the court excluded protection against age discrimination with regard to employee benefit plans and things that we are familiar with.

Justice Marshall said it immunized virtually all employee benefit programs from liability under the Age Discrimination in Employment Act, ADEA. Now, this is rare that Congress acts before something has gotten real bad and prevents the worse things from happening sometimes so we don't get into those situations.

We have some court cases already, but we are acting prior to major damage. In other words, most of the problem here, if we don't correct this, most of the problem is prospective. So I think that makes it all the more reason why we should act in a timely way on this, as fast as we possibly can.

I don't understand the court's ruling on this issue. It runs counter to what we thought was the very clear legislative intent when ADEA was passed and later amended, contrary to the position of the administration, which filed a friend-of-the-court brief in support of EEOC's implementation of ADEA.

So as a long-time supporter of the Age Discrimination in Employment Act, I share the concerns of my colleagues and others about the impact of the *Betts* decision. I urge us to act very rapidly with swift congressional passage of this act. Legislation is necessary. We can't just let it ride along, or more employers might be encouraged to come out from under what they were previously required to do by law, and we can't allow that to happen.

We want to encourage, not discourage continued participation in the workplace by older employees, and they certainly deserve every protection for health and pension benefits as any other workers. So I urge rapid passage of this legislation.

I along with Senator Cohen have other responsibilities this morning and have to go, but I did want to stop by and make that brief statement in support of this legislation.

Thank you, Mr. Chairman.

[The prepared opening statement of Senator Glenn follows:]

PREPARED OPENING STATEMENT OF SENATOR GLENN

Mr. Chairmen, I commend you for holding today's hearing to discuss S. 1511, the "Older Workers Benefit Protection Act," and I am taking this opportunity to request that I be added as a cosponsor of this important legislation.

Passage of the "Older Workers Benefit Protection Act" would restore the rights of millions of older workers to employee benefits—benefits such as health and disability protection and pensions. These rights are currently in jeopardy due to the June 23, 1989 Supreme Court decision in *Public Employees Retirement System of Ohio v. Betts*. Basically, the Court excludes protection against age discrimination with regard to employee benefit plans from coverage under the Age Discrimination in Employment Act of 1967 (ADEA). The *Betts* decision, in the words of Justice Marshall, "immunize(d) virtually all employee benefit programs from liability under the Age Discrimination in Employment Act (ADEA). . . ."

I do not understand the Court's ruling on this issue. It runs counter to the very clear legislative intent when the ADEA was passed and later amended. It is contrary to the position of the Administration which filed a friend of the court brief in support of the Equal Employment Opportunity Commission's (EEOC) implementation of the ADEA.

As a long-time supporter of the Age Discrimination in Employment Act, I share the concerns of my colleagues and others about the impact of the *Betts* decision; and I urge swift Congressional passage of the "Older Workers Benefit Protection Act." Legislation is necessary to overturn the *Betts* decision in order to ensure that protection for older workers under the ADEA is not diminished.

Older workers are a valuable resource and our attention should be directed toward encouraging, not discouraging, their continued participation in the workplace. An important way of doing this is by ensuring that employers cannot discriminate against older employees who are counting on a certain level of health and pension benefits during their retirement years.

Senator **Metzenbaum**. Thank you very much, Senator Glenn.

I might say that I have participated in any number of hearings in the United States Senate since I have been here. Seldom, almost never, do I see as many Members of the Senate who are present to participate, and I think it indicates the degree of concern that exists in the United States Senate and the Congress on this subject, and I am certainly very pleased to see so many with us here this morning.

Senator Kassebaum, I am particularly pleased to welcome you this morning.

Senator **Kassebaum**. Thank you, Mr. Chairman.

I think this is a good idea to have a joint hearing on a very important and complex topic, and I am here to listen to the witnesses and we will move ahead. Thank you.

Senator **Metzenbaum**. Thank you very much, Senator Kassebaum.

Senator Warner, we are very happy to have you here.

Senator **Warner**. I would like, Mr. Chairman, to congratulate the individuals who have responded to this hearing. As one who is rapidly advancing in age, I would like to see us put some teeth back into this ADEA. I am prepared to join you and others to do so.

Senator **Metzenbaum**. We are very happy to have you do so. And I might say, for the press, I wanted you to know that I am very happy to announce that Senator Warner has joined up and is now a member of the Democratic Party. [Laughter.]

Ms. Betts, Carolyn Betts, we are happy to have you here with us this morning, and Mr. Sousa.

Would you please proceed, Ms. Betts.

STATEMENTS OF CAROLYN BETTS, BROWNSTEIN, ZEIDMAN & SCHOMER, WASHINGTON, DC; AND HARRY SOUSA, BRISTOL, RI

Ms. **Betts**. Thank you very much. I would like to say that I am particularly gratified that both of my mother's Senators are here today and are supporting this bill: Senator Glenn and Senator Metzenbaum.

My mother isn't able to be here today. She is in the third stage of four stages of Alzheimer's disease. She weighs about 85 pounds and she is in a nursing home that costs $2,200 a month, before we even get to the medical expenses or anything else.

My mother started acquiring this horrible disease at about the age of 59. However, this is the type of thing that people don't diagnose easily, and she didn't actually have a diagnosis, other than disorientation, until about 2 years ago. My mother tried to work as long as possible. She was a speech pathologist for the Hamilton County Board of Mental Retardation. She taught retarded children and young adults to communicate with their families and other people.

However, she had not worked there long enough to be fully vested in the public employee retirement system. My mother was actually partly-disabled before she was 60 but she didn't know, and she wanted very much to work as long as she could. So she did, and that ended up being to her detriment.

My mother grew up in the Depression. Her father died when she was seven, while all their money was in a bank in North Carolina, where they had lived for his health. She grew up feeling that the things she feared most were dying a long death when she didn't have mental capacity, and being a burden on her family, being destitute and going to the poorhouse.

Unfortunately, all of her fears came to fruition, and that is where she is today.

My mother's money will hold out for perhaps another 6 months from her estate. At that point, her income from PERS and Social Security and the little bit of alimony she has will not be enough to pay her monthly bills. She will have to go on Medicaid.

The effect of the Supreme Court's decision is that my mother goes on Medicaid sooner. I think that this is an important thing to understand, because many people are against the public purse paying for social welfare programs. Unfortunately, this is exactly what happens here, because my mother will go on Medicaid sooner as her employer was allowed to structure her benefit package so that she wasn't entitled to disability insurance after the age of 60.

She worked as long as she could, and she was demoted twice. The one job that I know she had was as sort of a babysitter of retarded adults who were working in a sheltered workshop. The last incident that occurred at her job that she told us about was that a young man that she was helping on a bus, a retarded man, fell on her and broke her rib. She continued to go back to work after this and apparently was fired. She was told she had to leave, but she was so afraid and so ashamed of what was going on that she went back anyway.

My sister got a call at work one day and it was my mother's supervisor saying she had to come get Mother because she could no longer work there.

Amy went to get Mother and she fell into Amy's arms sobbing, saying, "I know I did something wrong and I don't understand. I'm really sorry."

She simply didn't understand what was going on. When my sister went in to talk to my mother's supervisor, she asked what we could do. The supervisor didn't even know what was in the plan, so he said he would have to talk to her after he had reviewed the plan.

When he called her back he told her that Mother was not entitled to disability benefits because she was 60 years old. Her two options were: to take early retirement, which she was not fully vested in, so she would have to take a penalty, and her early retirement would be $158 a month; or to take a leave of absence with no pay. Her disability retirement, if she had been 25 when this happened, would have been $350 a month.

One of the things that I think is important to understand is that my mother returned to work after having spent about 25 years as a full-time homemaker and a minister's wife. She got a master's degree in speech pathology at 55. Like many other women, my mother was a displaced homemaker, because she was divorced when she was in her late 50s.

But she returned to work, and earned her benefits just like anybody else. I think it's very typical of women returning to the work force after they have raised children, that they would be the first ones not to be fully vested in their plans. I think this decision has an impact on them, perhaps even greater than their male counterparts.

Is my time up?

Senator **Metzenbaum**. Because it was your mother that was involved in this all-important case, I will give you a little extra leeway if you need it.

Ms. **Betts**. I would just like to elaborate on the fact that my mother worked in a number of jobs the whole time I was growing up, on and off, and she never planned on having a career. My mother went to Smith College, and back then women who were well-educated did not ordinarily go into the work force. They were dependent upon their husbands to provide them with the security they would have later on.

The rules changed later on, in the 1960's and 1970's and 1980's. Many people I know, including some of my friends' mothers, are in the same situation: they have been divorced when their children have already left home and they're trying to be successful in the work force. It's hard enough already for them to get jobs. They are clearly making less money than they would have if they had worked their whole lives.

The people who are over 60 or over 55 when they're disabled are the ones who need the help the most. The medical expenses and other care expenses for a disability are bad enough. When you take anything else away that these people would count on, it makes it that much more difficult.

The $200 a month, in my mother's case, does not make the difference between anything. She is going on the public dole one way or the other. However, I tell you that I truly believe that taking anything away from these people is just completely unfair, particularly when it's something that someone who had been working for the same number of years as one who is 27 years old would be entitled to.

Thank you very much, Senator Metzenbaum.

[The prepared statement of Carolyn Betts follows:]

PREPARED STATEMENT OF CAROLYN BETTS

I am here today because my mother cannot talk to you herself. Today, my mother is in a nursing home outside of Cincinnati and has Alzheimer's Disease or a related disorder, although her former employer, in denying her disability benefits available to younger workers, takes the position she is not "disabled."

My mother was the healthiest person I have ever known. We thought she would live to be at least 90 and know her great grandchildren. Her two greatest fears in life were these: (1) that she would become financially destitute, unable to support herself and (2) that she would die a long agonizing death and be a burden on her family. Her greatest fears are being realized as she dies inch by inch on the road to financial ruin. On September 30, she will turn 66. She is in the third of four stages of Alzheimer's Disease. The fourth stage is death. The symptoms started to appear by the time she was 59.

My mother was a child of the Depression whose father died when she was 7: the year the stock market crashed. Somehow, her mother found a way to send her and her sister to Smith College. It did not occur to my mother that she could have had a career, even though she was an imposing and articulate woman, gifted with words in a way few people are, and had a fine classical education. She worked in a series of jobs not suited for her talents in order to support herself and her family. After graduating from Smith, she was a medical secretary for Dr. Albert Sabin -- the developer of the Sabin polio vaccine. She was a secretary at Harvard Medical School through two pregnancies while her husband was in Episcopal Theological

Seminary. She served sincerely and conscienciously without pay for almost 30 years as a minister's wife. She went back to work as an English teacher to earn money for me to go to private school in the 9th grade because my public school was not very safe and I was afraid. Then she was a stenographer in the German and Geology Departments of the University of Cincinnati. She worked in jobs for which she was overqualified, doing things she was not gifted at, reporting to people who were less intelligent then she, so that her children could go to good schools. It did not occur to her that she had any choice. And the party line was that this was her role as a woman, and she would be taken care of in her old age if she played by the rules.

When she was in her 50's the rules changed. Her children grew up and left home and her husband wanted to lead a different kind of life. I talked to her about the importance of having a fulfilling life outside of her family and she must have taken that to heart, because she decided at 52 to return to school to get a Master's in Speech Pathology at University of Cincinnati. She worried about flunking anatomy and statistics, but actually did well and made lots of friends. I never told her, but now I realize what a tremendous accomplishment it was for a fifty year old to change her role in life.

After being awarded her Master's Degree in 1978 at age 55, Mother went to work as speech pathologist for the Hamilton County Board of Mental Retardation. Her job was fulfilling and involved tremendous amounts of patience because mentally retarded clients don't make dramatic progress on a day to day basis. She was enthusiastic about it and would tell stories about children with cerebral palsy and brain damage. She drew pictures of dogs, cars, horses and the like to elicit responses from the children and teach them to speak so that their families and others could understand them. She recognized their struggles. At some point she started losing her ability to function effectively in everyday life. She forgot dates, suffered great anxiety and did strange things like getting lost, forgetting appointments and leaving the gas stove burners on. Then she started having a very difficult time filling out "IEPs", the progress reports required to be submitted for each disabled child in public schools or programs. We thought she was just under stress because my father was talking about changing jobs, which would have meant leaving the house she had lived in for 20 years. The doctors gave her valuim and thyroid pills. Psychiatrists at $100 an hour told us she did not have Alzheimer's Disease. In 1982 my father left his job and left my mother.

We moved her to a comfortable apartment and then, when she was demoted in her job because of her illness, we moved her to a cheaper, smaller place next door to me. Instead of working as a speech pathologist, she was on an assembly line in sheltered workshops helping mentally retarded people do piece work. She desperately wanted to keep her job and felt like a failure because she was not able to do it well. She was at that time 60. She became unable to care for her beloved dog Georgie and started eating frozen dinners without thawing them. She would go to the supermarket and get lost on the way home. We would get calls from the police when they would find her. She took a second demotion. The last incident I recall from her work was when a big mentally retarded teen-age boy fell on Mother as she was helping him get onto a bus and broke her rib. At some point after that, she was told by her employer that she had to leave. She was so afraid of what would happen if she didn't have a job to support herself that she went back to her job even after they told her not to come back. Her supervisor called my sister Amy and told her to come pick Mother up because she could no longer work there. Mother was terrified of not having enough money to live on and was hysterical when she tried to understand and to explain to us what had happened. She thought she had done something wrong and was ashamed of losing her job.

We spoke with Mother's supervisor to find out what to do. He said she could take permanent early retirement at $158/month or she would have to take on unpaid leave with nothing. He said that Mother couldn't go on disability because she was over 60. My sister vividly recalls saying "you mean she can't qualify for disability because she is over 60?" She was 61. When she retired, Mother was making about $12,000/year as a glorified babysitter -- significantly less than her salary as a speech pathologist when she started. The retirement income was figured as a percentage of her average salary over 5 years, so she got less retirement because she was working while she was partially disabled! If she had qualified for disability retirement, she would have been entitled to $350 per month. Had Mother been able to take disability earlier when the symptoms started to prevent her from practicing her profession, she would have been better off. She was penalized for trying to work and to overcome her terrifying illness.

My stepmother, an EEOC case worker, told us denying Mother disability on the basis of age was not legal. If we didn't just happen to know someone who was an expert in the subject, we never would have known. We got an attorney to advise us what to do. We were particularly concerned because we thought at the time that Mother might be able to return to work, but if she retired, she would not ever be able to go back to work. Her small income from early retirement, a small amount of alimony and a small income from a few private investments was not nearly enough to cover her living expenses and medical bills. Fortunately, she was entitled to health insurance because she was disabled before 1986. Other people in Mother's situation who are disabled after 1986 are not entitled to health insurance through PERS and may spend most of their disability income for insurance premiums.

We filed suit and won our case in District Court. PERS appealed. We won again in the Circuit Court of Appeals. PERS petitioned the U.S. Supreme Court to hear the case. During this time Mother went into the first nursing home. Because it was so expensive to pay for typesetting all the briefs for the Supreme Court, we filed a motion for hearing in forma pauperis so the court would pay the printing costs and filing fees. It was humiliating to call Mother a pauper and put her at the mercy of the court, but Mother's money was needed to pay nursing home bills and the amount of money we could win in the case was not much more than the court costs.

Mother was initially put in the only nice senior citizens' independent care facility we could cajole into taking her. It didn't work out. The nursing home kicked her out because she would wander around into people's rooms and behave erratically as the result of her disease and the medication prescribed for her. She was so afraid she had nowhere to go, she was put into the psychiatric ward of Christ Hospital for several weeks in a straight jacket. Have you ever seen your mother in a straight jacket?

After leaving Scarlett Oaks, Mother lived with my sister and her in-laws while my brother-in-law was in grad school and my sister was working. For a while she did volunteer work for a local camp for retarded children so she could feel productive. It helped, but she had to give it up. When my sister moved to Illinois, we put Mother in another nursing home. It was difficult to find anywhere that would accept her. The problem was that she was young, physically well and ambulatory and required more care than someone who was bed ridden. Mother didn't understand she couldn't walk into other people's rooms. They sedated her horribly and tied her into bed and she got horrible bedsores. She was 64 years old. Finally, in the summer of 1986, she had to be put in the full care nursing facility where she had been living, and was diagnosed as having an Alzheimer's Related Disorder. She remains there today in her bed, weighing as little as 85 pounds. She is 66. Some time within the year her assets will all be wiped out. She will have to go on Medicaid and we hope she will be able to stay in the same nursing home. She would be working today if she were not ill, but PERS still says she is not entitled to disability benefits.

I have told this story in great detail because it is important for you all to understand how helpless disabled people and their families are. The diseases and other disabling conditions may be different, but the stories all end up the same. Friends and family other than immediate family members disappear when a humiliating disease starts to take people's minds and good looks. When these things happen to displaced middle-aged women who have worked their whole lives at home and never developed another career, they become helpless. My mother's brother and sister offered no help or support. Her husband left her and has a new family. Then her employer denied her a benefit that any 25 year old employee would have been entitled to under the same circumstances. Her disability was denied because Mother continued working instead of giving in to her illness.

The money we lost from PERS would only pay Mother's bills for part of a year longer. We have prepaid funeral expenses already and are preparing to deal with turning her over to the State of Ohio. Then, she will own nothing and the nursing home and the State will be calling all of the shots. The State will collect alimony from my father, her Social Security, if she ever gets it, and her PERS income and will pay the nursing home. If we want Mother to have anything personal after the money runs out, we will have to buy it for her. My brother and sister and I live have no option to take care of it all ourselves -- we just don't have the $26,000 per year it takes to keep my mother in the nursing home.

The insanity of it all is that those who favor private, rather than public, funding of social welfare programs have seen to it that people like my mother -- who tried to be self-sufficient as long as possible -- will enter the public welfare system at an earlier point. Businesses and other employers are permitted to structure their employee benefit plans so that older people who would otherwise make claims under their employers' benefit programs will be forced to go on Medicaid or public welfare. You and I will have to pay for that in our taxes, won't we?

My mother's retirement plan now denies health insurance to disabled employees over 60 who do not have ten years of service. As result of that provision, if she had become disabled after 1986, she would have no health insurance today through PERS. Her money would be long gone by now if she had no health insurance. She would be on Medicaid today. If she had not vested in her retirement plan, she would not qualify for early retirement even at the reduced rate, and she would get nothing. My mother and people like her earned these benefits as surely as younger employees. Is it right that they should be taken away from her because of her age? My mother's disability retirement would not solve all of the problems that a horrible disease has caused, but every little bit helps in meeting the astronomical costs of this and virtually any other disability. For some people, qualifying for disability retirement might mean not losing a house or not having to apply for food stamps.

If I have any regrets, it is that we never said certain things to my mother when she was still aware of what was going on around her. We should have said you have a right to full disability retirement based upon your hard earned salary as a speech pathologist. We are proud of you for having accomplished so much. You are as good and as valid a human being as any man who worked full time for 40 years, because you worked more than full time for your family. We won't leave you and we will take care of everything. You are greatly loved and appreciated. I did not say these things. Being here today to try to do everything I can to try to make her agony count for something is all I can think of to do to make up for that. The horror my mother would feel if she knew she will go on welfare if she survives the year makes me glad she doesn't know.

Senator **Metzenbaum**. Thank you very much, Ms. Betts.

I think we will hear from our other witness before we open up the committee to questions.

Mr. Sousa.

Mr. **Sousa**. I am Harold Sousa. I would like to tell my story of employment at Fulflex, Inc. of Bristol, RI. I was hired by Fulflex on July 21, 1952. I was 23 years old and I was paid 85 cents per hour. The company's only product at this plant was making elastic thread that was used to make golf balls.

My first job was as a splicer, which consisted of taking strips of rubber, sanding the two edges and gluing them together. Later, I became a knifeman in which my duties were to take the cutters from the machines when they were defective and put on new ones.

I worked steadily for Fulflex for more than 33 years. I worked at almost every job in the factory. I was never laid off, never reprimanded or docked pay. I worked a lot of overtime to get work out when necessary. I worked many 16-hour Saturdays and 16-hour Sundays. I was willing to help the company whenever needed.

The last few years I earned approximately $22,000 annually, which included a lot of overtime. My weekly wage before overtime was about $320. My final job was as a 60-inch mill operator. I would put bales of rubber in the mill, cutting the rubber until it would bond together and was very hot. Then I would take the rubber off in strips, and I would start all over again.

Fulflex never paid bonuses. The Bristol plant was their only unionized plant. They have plants in North Carolina, Ireland, Vermont, Canada and Tennessee. Through the years the union would negotiate wage increases, but a lot of times the money also had to go for pensions, other holidays or for health benefits. So wage increases were usually small, sometimes 5 cents per hour.

The reason they were so small was we decided sometimes that we wanted the money to go into a pension fund. I was like a lot of people at the plant: Most of us started at a young age and stayed until retirement, which meant when they retired they would have 35, 40 or 45 years of seniority.

After its big expansion, Fulflex decided in 1985 to close the Bristol plant, which by the way was the only unionized plant in the corporation. They said costs for electricity, taxes, Workers Compensation and other things were too high. But I think the fact that we were the only unionized plant was also a reason.

Our union president immediately started to look into every possible way to make sure that all the people losing their jobs would have everything they were entitled to. Our union contract had a special section for separation pay when the plant closed. This section said that for an older employee, an employee with over 20 years of service, separation pay was his average weekly pay times four times the number of his years. But, then they would deduct the value of your pension from the separation pay, so the longer you worked the less money you got in separation pay.

This section had been in the union contract since 1953, when the union first came in. But we never used it or paid much attention to it because this was the first time the plant closed. But now the union realized that the separation pay section for plant closings violated the age discrimination law which was passed in 1967.

The separation pay section was entirely separate from the section of the union contract that talked about the pension plan. They were negotiated separately. Our union told the company that the separation pay section was illegal, but the company said that Federal law issues couldn't be arbitrated even though the contract says Federal law has to be followed.

When the plant closed, we filed a discrimination claim with the EEOC in Boston. Our local union sent a letter to the EEOC supporting our claim. I have a copy of it here, and I attached it to our statement.

The EEOC first said we had a case, then we didn't. We appealed to the Washington EEOC office, and they said we did have a case. The EEOC didn't bring our case for us because we already had a lawyer. The reason we had a lawyer was because the company had tried to stop paying our health insurance benefits for retirees, which the union contract said they had to pay.

We went to arbitration on this, and we won.

We filed our discrimination case for separation pay in Federal court. It was clear when we went to court on December 7, 1988, that the judge hadn't read any of our papers and was clearly siding with Fulflex. I wasn't surprised when we lost.

Although we appealed to the appellate court, I found out that our case was dismissed yesterday because of the Supreme Court's decision that it is okay to discriminate against older workers in providing fringe benefits.

As I said, I had 33 years' seniority and was making $320 a week. Under the formula, I was entitled to about $47,000 in separation pay. But my pension was worth almost $31,000 and it was deducted from my separation pay.

A few days before the plant closed, they recalculated the pension value and increased it. So I lost another $2100. So I ended up with about $13,900 instead of $47,000. And because I needed money and I wanted to get the health benefits the company was required to provide to retirees, I had to take early retirement. My retirement benefit is $305 each month. If I could have waited until I was 65, I would get $495 per month. And if I had gotten my full separation pay, I could have afforded to wait at least a while before taking my pension.

A lot of people with similar pay and less seniority got more separation than I did and will get a larger pension benefit when they retire.

For example, one person who was 43 when the plant closed and had 26 years of seniority was entitled to $38,000 separation pay. His pension value was $3,500. I don't know how they got that figure, but I think it was so low because he was much younger than I was and there was a lot more time until he retired.

He got $34,000 of separation pay. When he's 65 he will get $392 per month in his pension benefit. I will still be getting $305, and I got much less separation pay than he did. Also, he got another job and is starting to earn another pension benefit.

He is my friend and I don't begrudge him his money, but my friend Mike Pellegrimo, who is with me here today, was older and had more seniority. He got only $2,900 separation pay after 39 years of service. He was entitled to more than $55,000. And because he had to take early retirement like me, he was entitled to only $520 per month in his pension benefit, rather than $585 he'd have gotten if he had been able to afford to wait till age 65.

He would have been able to afford that if he had gotten separation pay. Mike was 62 when the plant closed. Another guy who was 54 when the plant closed but made the same money as Mike, and also had 39 years' seniority, received almost $26,000 in separation pay, compared to Mike's $2,900. That guy took early retirement and got a pension benefit of $300 per month. The only difference between Mike and him is that he was younger.

Losing the separation pay hurts in other ways. The separation pay was a lump sum of cash. I could have invested it and perhaps helped it grow. Much more importantly, if I died today, my pension stops and my wife gets nothing from my pension. But if I had gotten my separation pay my wife would have had some money.

The pension plan was funded separately from the separation pay and I earned them separately. Some of the money in the pension plan is money that the union negotiated instead of us getting in wages. So I helped pay for my own pension plan, but my separation pay was supposed to be separate from that.

I didn't understand it then, and I don't understand now, why I didn't get the money I earned. It's as if I was penalized for being a loyal and long-term employee. And it didn't just happen to me. Many husband-and-wife couples worked in the plant and lost twice as much.

I hope and pray that Congress will overturn the Supreme Court's decision that caused my case to be dismissed yesterday, and I believe I should get this money that is rightfully mine.

[The prepared statement of Mr. Sousa (with attached letter from United Rubber Workers) follows:]

PREPARED STATEMENT OF HAROLD A. SOUSA

I am Harold Sousa. I would like to tell my story of my employment at FULFLEX INC. of Bristol, R.I.

I was hired by FULFLEX on July 21, 1952. I was 23 years old and I was paid 85 cents per hour. The company's only product at its Bristol plant was making elastic thread that was used to make golf balls.

My first job was as a splicer, which consisted of taking strips of rubber, sanding the two edges and then gluing them together. Later I became a knifeman, where my duties were to take the cutters from the machines when they were defective and put in new ones.

I worked steadily for FULFLEX for more than 33 years. I worked at almost every job in the factory. I was never laid off, never reprimanded, or docked pay. I worked a lot of overtime to get the work out, when necessary. I worked many 16 hour Saturdays and 16 hour Sundays. I was willing to help the company whenever needed.

The last few years I earned approximately $22,000 annually, which included a lot of overtime. My weekly wages before overtime were about $320.00.

My final job was as a 60 inch mill operator. I would put bails of rubber in the mill, cutting the rubber until it would bond together and was very hot. Then, I would take the rubber off in strips. Then I would start again.

FULFLEX never paid bonuses. The Bristol plant was their only unionized plant (they have plants in NC, Ireland, VT, Canada, and Tennessee). Through the years, the union would negotiate wage increases but a lot of times the money also had to go for the pension, another holiday or for health benefits. So, wage increases were usually small -- sometimes 5 cents/hour. The reason they were so small was because we decided sometimes that we wanted the money to go into the pension plan instead.

I was like a lot of people at the plant. Most of us started at a young age and stayed until retirement, which meant when they retired they would have 35, 40, and 45 years of seniority.

After its big expansion, FULFLEX decided in 1985 to close the Bristol plant, which by the way was the only unionized plant in the corporation. They said our costs for electricity, taxes, workers compensation and other things were too high. But, I think the fact that we were the only unionized plant was also a reason.

Our union President immediately started to look into everything possible to make sure that all the people losing their jobs would leave with everything they were entitled to.

Our union contract had a special section for separation pay when the plant closed. This section said that for an employee with over 20 years service, separation pay was his average weekly pay times 4 times his number of years. But, then they would deduct the value of your pension from your separation pay. So, the longer you worked, the less money you got in separation pay.

This section had been in the union contract since 1953, when the union first came in. But, we never used it or paid much attention to it because this was the first time the plant ever closed. But, now the union realized that this separation pay section for plant closings violated the age discrimination law, which was passed in 1967.

The separation pay section was entirely separate from the section in the union contract that talked about the pension plan. They were negotiated separately.

Our union told the company that the separation pay section was illegal, but the company said that federal law issues couldn't be arbitrated, even though the contract says that federal law has to be followed.

When the plant closed, we filed a discrimination claim with the EEOC in Boston. Our union local sent a letter to the EEOC supporting our claim. I have a copy of it here and I attached it to my statement. The EEOC first said we had a case, then said we didn't. We appealed to the Washington EEOC office, and they said we did have a case. The EEOC didn't bring our case for us because we already had a lawyer.

The reason we already had a lawyer was because the company had tried to stop paying for our health insurance benefits for retirees, which the union contract said they had to pay. We went to arbitration on this and we won.

We filed our discrimination case for the separation pay in federal court. It was clear when we went to court on December 7, 1988 that the judge hadn't read any of our papers and was clearly siding with FULFLEX. I wasn't surprised when we lost.

Although we appealed to the appellate court, I just found out that our case was dismissed yesterday, because of the Supreme Court's decision that it is OK to discrimination against older workers in fringe benefits.

As I said, I had 33 years seniority and was making $320 a week. Under the formula, I was entitled to about $47,000 in separation pay. But, my pension was worth almost $31,000 and it was deducted from my separation pay. A few days before the plant closed, they recalculated the pension values and increased them - so I lost another $2100. So, I ended up with about $13,900, instead of $47,000.

And, because I needed money and because I wanted to get the health benefits the company was required to provide to retirees, I had to take early retirement. My retirement benefit is $305 each month. If I could have waited until I was 65, I'd get $495 each month. And, if I'd gotton my full separation pay, I could have afforded to wait at least for a while to take my pension.

A lot of people with similar pay and less seniority got more separation pay than I did, and will get a larger pension benefit than me when they retire. For example, one person who was 43 when the plant closed and had 26 years of seniority was entitled to $38,000 separation pay. His pension value was $3500 -- I don't know how they got that figure, but I think it was so low because he was so much younger than I was, so there wa a lot more time until he retired. He got $34,500 in separation pay.

When he's 65, he'll get $392 each month in his pension benefit. I'll still be getting $305, and I got much less severance than he did. Also, he got another job and is starting to earn another pension benefit.

He's my friend, and I don't begrudge him the money. But, my friend Mike Pellegrino -- who is here with me today -- was older, and had more seniority, and got only $2900 separation pay after 39 years of service. He was entitled to more than $55,000. And, because he had to take early retirement like me, he was entitled to only $520 per month in his pension benefit, rather than $585 he'd have gotton if he'd been able to afford until he was 65. He'd have been able to afford that if he'd gotton separation pay.

Mike was 62 when the plant closed. Another guy, who was 54 when the plant closed but made the same money as Mike and also had 39 years seniority, got almost $26,000 in separation pay, compared to Mike's $2900. And, that guy took early retirement and got a pension benefit of $300 per month. The only difference between him and Mike was that he was younger.

Losing the separation pay hurts in other ways. The separation pay was in lump sum of cash. I could have invested it and perhaps helped it to grow. Much more importantly, if I died today, my pension stops and my wife gets nothing from my pension. But, if I had gotton my separation pay, my wife would have that money.

The pension plan was funded separately from the separation pay, and I earned them separately. Some of the money in pension plan is money that the union negotiated instead of us getting it in wages. So, I helped to pay for my own pension plan, but my separation pay was supposed to be separate from that.

I didn't understand then, and I don't understand now, why I didn't get the money I earned. It's as if I was penalized for being a loyal and long-term employee. And, it didn't just happen to me. A lot of husband and wife couples worked in the plant and lost twice as much money.

I hope and pray that Congress will overturn the Supreme Court decision that caused my case to be dismissed yesterday. I believe I should get the money that is rightfully.

URW
Local Union No. 474
United Rubber, Cork, Linoleum &
Plastic Workers of America, AFL-CIO, CLC Bristol, Rhode Island 02809

April 14, 1986

LETTER TO EEOC

Dear Sir

In regard to your notice of charge dated April 8, 1986, I would like to clarify and reinforce our member's position in the matter of age-discrimination by our former employer, Fulflex, Inc.

On July 15, 1985, Fulflex announced the closing of the Bristol plant with mid December of 1985 being the earliest date of closure. The president of our local union at that time, Mr. Frank Correira, began to research our labor and pension agreements to insure that our members would receive all benefits due them and also to insure that our agreements were in compliance with Federal and State laws.

In August of 1985, Mr. Correira learned that our Separtion Pay Agreement was in conflict with Federal law with respect to reducing a persons separation pay (severance pay) by deducting the vested a accrued pension benefits from it.

The discovery of this discriminatory language was brought to the attention of the Fulflex management with a verBAL request that we amend the agreement and avoid violating the Age Discrimination Act of 1967.

Our labor agreement, dated October 1, 1983, Article X General, Paragraph 1, "Conflict with laws" clearly states that if the agreement was in conflict with the Federal or State laws "it is agreed that such laws shall supersede the conflicting provisions, etc."

It was clear to the Union that paragraph 4 of our Separation Pay Agreement was in direct violation of the Federal Age Discrimination Act of 1967. We also had made contact with your department during this time and read some of the court decisions that your department had successfully litigated, further convincing us the need for a change in our language.

URW
Local Union No. 474
United Rubber, Cork, Linoleum &
Plastic Workers of America, AFL-CIO, CLC
Bristol, Rhode Island 02809

Our position is and was at that time that the separation pay and pension agreements were and are two separate agreements; each providing benefits to our members separately.

We later grieved this violation in writing. Enclosed with this letter, you will find a copy of our grievance. Our position, today, is the same as it was prior to the plant closure. Older seniority employees should not of had their separation pay reduced because of age, resulting in their receiving a considerably lower separation benefit than their junior employees.

We ask that the EEOC continue to investigate and litigate this matter on our behalf. If there are any questions or additional information needed, please feel free to contact me, John Amaral, 134 Mulberry Road, Bristol, Rhode Island, 02809.

Sincerely yours

John Amaral

John Amaral
President, Local 474

John Amaral

JA/da

Enclosure

Senator **Metzenbaum**. Thank you very much for a very clear statement, Mr. Sousa. I commend you on it.

I have a few questions for Ms. Betts.

But before doing so, I see that Senator Graham has joined us.

Senator Graham, do you have an opening statement you would care to make?

Senator **Graham**. Mr. Chairman, I do not have an opening statement, but I share your opinion of the comments that we have just heard. I commend you and the others who have developed and introduced S. 1511, and would request to be added as cosponsor.

Senator **Metzenbaum**. Thank you very much.

Senator **Graham**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. We are very happy to have you as cosponsor.

Ms. Betts, do you know of other employees within the Ohio State system who have been denied disability or health benefits due to age?

Ms. **Betts**. Yes. Our attorney, Bob Laufman, submitted a written statement and he discusses several of them. I am particularly aware of one woman who also worked for the same employer my mother did. She was disabled after 1986, when their plan changed, and she is not even entitled to health benefits.

In her case, she would have received $455 a month. Instead, she is only receiving $62.50 after you subtract out the Social Security survivors benefits that must be subtracted. And her health care costs are $179 a month. So you can see that she brings in $62.50 and she pays out $179.37 for health benefits.

This woman has cancer. Her husband has died, and she's not eligible for Social Security for another year. I'd have to say that was the most touching case.

My understanding is that there are over a million employees in Ohio under this plan, and in addition to that, there are many teachers. I think all of the teachers in Ohio are covered under a plan that has the exact same provisions. So there have to be an awful lot of people in this situation.

Senator **Metzenbaum**. I understand from my staff that we have your mother's attorney's statement describing other older workers who have suffered benefit losses because of their age. And that will be made part of the record, as will the letter that Mr. Sousa commented upon.

[The prepared statement of Mr. Laufman follows:]

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617 Vine Street
Cincinnati, Ohio 45202
(513) 621-9100

Robert F. Laufman
Trudy D. Rauh
Alphonse A. Gerhardstein

September 23, 1989

Jim Brudney
Chief Counsel, Labor Subcommittee
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Brudney:

Enclosed is my statement for the Senate Labor Subcommittee hearing on S.1511 to he held on September 27, 1989. I request that the statement be made part of the record.

Sincerely yours,

Robert F. Laufman
Robert F. Laufman

RFL:ma

Enclosure

PREPARED STATEMENT OF ROBERT F. LAUFMAN, ATTORNEY AT LAW

My name is Robert F. Laufman of the law firm of Laufman, Rauh and Gerhardstein of Cincinnati, Ohio.

I have represented June Betts throughout her litigation and argued her case in Public Employees Retirement System v. Betts, 109 S.Ct. 2854 (1989). I also represent plaintiffs in a class action against PERS and two other State of Ohio Pension plans raising identical issues.

On September 21, 1989, I testified at hearings on H.R. 3200 before the Select Committee on Aging, the Subcommittee on Labor-Management Relations and the Subcommittee on Employment Opportunities. S.1511 and H.R.3200 are identical, word for word. My prepared statement for H.R.3200 is attached.

At this time I would like to supplement that statement to include an issue raised during testimony on September 21.

Early Retirement

The EEOC has indicated that it favors an amendment that would permit early retirement. I believe such an amendment is unnecessary and unwise.

As I stated in the House hearings, there is nothing wrong with early retirement as long as it is truly voluntary and is not discriminatory. Employees who wish to take advantage of an employer's offer to retire at an earlier age should be free to do so. However, an older worker should not be treated less favorably because of his age.

There are many early retirement incentive plans that do not discriminate on the basis of age. Examples are lump sum incentives, incentives based on years of service, and incentives based on annual salary.

There are other early retirement incentive plans which are discriminatory and are designed to coerce employees into involuntary retirement. Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988) is such an example.

In 1980, when City Colleges had a mandatory retirement age of 65, the Illinois legislature raised the mandatory retirement age to 70. City Colleges then drafted an early retirement program "to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members." The plan was open to faculty members between 55 and 69 and had two discriminatory provisions.

> Group Insurance Policy. Faculty members who retire between the ages of 55 and 64 continue to be covered by the Colleges' group insurance policy (which includes life, health, dental, vision, homeowner's, and automobile insurance) until they reach the age of 70. Those who retire after age 65 cease to be covered upon retirement.

Accumulated sick pay. In addition to their early retirement pension, faculty members could receive a lump sum equal to a percentage of accumulate sick leave, valued at his base salary. The percentage of accumulated sick leave paid as a lump sum was based on age at retirement as follows:

Age at Retirement	Percentage credited
55-58	50%
59	60%
60-64	80%
65-70	45%

This so-called early retirement plan was clearly intended to replace an unlawful mandatory retirement at age 65 policy. The Seventh Circuit held the plan's sharp reduction in benefits at age 65 was discriminatory on the basis of age and could not meet the equal cost, equal benefit test.

S.1511 should not be amended to permit early retirement plans but the courts should be permitted to resolve early retirement plans on a case by case basis.

S.1511 Should Be Passed Without Delay

S.1511 should be passed without delay if the retroactive provisions are to help those victims affected by the Supreme Court's decision in betts. Already, the courts are reversing or dismissing employee benefit cases brought under the ADEA.

On August 16, 1989, the Ninth Circuit, relying entirely on Betts, held that a discriminatory disability retirement plan was exempt under § 4(f)(2) of the ADEA. See Robinson v. County of Fresno, 50 FEP Cases 1064, ___ F.2d ___ (9th Cir. 1989).

I ask that this statement and the attached statement be made a part of the record.

PREPARED STATEMENT OF ROBERT F. LAUFMAN BEFORE THE SELECT COMITTEE ON AGING SEPTEMBER 21, 1989

Thank you for inviting me to appear at this hearing.

My name is Robert F. Laufman of the law firm of Laufman, Rauh and Gerhardstein of Cincinnati, Ohio.

I have represented June Betts throughout her litigation and argued her case in Public Employees Retirement System v. Betts, 109 S.Ct. 2854 (1989). I also represent plaintiffs in a class action against PERS and two other State of Ohio Pension plans raising identical issues.

Today, I am here to discuss the plight of some of the class action members who are suffering as a result of the Supreme Court's decision in Betts.

Impact of the Betts Decision

Carolyn Betts has already described the effect age discrimination in employee benefits had on her mother. Now, I would like to describe the impact age discrimination in employee benefits is having on three other members of the Public Employees Retirement System (PERS).

Anna Mae Hettesheimer is a widow who lives in Cleves, Ohio. Her medical condition prevents her from attending this hearing.

Mrs. Hettesheimer was raised in Cincinnati. In 1944, after graduating from high school, she worked for three years until she left her job to raise a family. For the next 32 years, she was a homemaker for her husband and their children, but in 1979, when she was 53, her husband became totally disabled and she went back to work. Mrs. Hettesheimer's employer was the Hamilton County Board of Mental Retardation and Developmental Disabilities, June Betts' former employer. For 9 1/2 years, as an employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities, she cared for the mentally retarded, and then Mrs. Hettesheimer learned she had cancer. When chemotherapy made her too ill to work, she submitted her application for disability retirement to PERS. PERS promptly denied her disability retirement because she was over 60 years of age. By July 1988 she had used up her sick leave and went on unpaid sick leave. Finally, in April of this year she applied for regular retirement.

On regular retirement she receives only $187.50 per month but since her Social Security survivor's benefits are reduced by two-thirds of her pension, she nets only $62.50 per month. Had she been eligible for disability retirement, she would have received $455 per month.

A bigger problem for Mrs. Hettesheimer is health care. Members of PERS who receive disability retirement benefits also receive free health care for life. Because she has been denied disability benefits due to her age, she is also denied health care benefits. Instead, she must purchase her own health care for $179.37 per month, which is more than the amount she nets from PERS disability. When her right to purchase medical coverage under COBRA runs out in July, 1990, she will be 64 and ineligible for Medicare. No insurance company will sell health care coverage to a person receiving treatment for cancer at any price. At that point she will have extensive medical expenses, but will be unable to purchase medical coverage. For 35 years she didn't use her health care and soon she will be without it when she needs it most. But for the Supreme Court's decision in Betts, she would receive both disability benefits and health care.

Robert E. McGill lives in Tionesta, Pennsylvania. For nearly 10 years he was the director of the News Service at Youngstown State University, Youngstown, Ohio. Prior to that he was a reporter and news editor for the Sharon Reporter in Sharon, Pennsylvania.

In 1988, Mr. McGill was hospitalized for lung cancer and has been confined to his home since August of that year. His wife was forced to quit her part-time job so she could care for him.

After using all of his accumulated sick leave and vacation days, he was forced to retire on March 31, 1989 from his position at Youngstown State University where he had been employed since November 1979. Because he was over 60 years of age he was not eligible for disability retirement.

At the time of his retirement he was earning $32,000 per year and his wife had her earnings from her part-time employment. On retirement he will receive only $501 per month from PERS. Two-thirds of that amount will be deducted from his Social Security benefits which are presently $686. Had he been eligible for disability benefits, he would have received benefits of $800 per month.

Like Mrs. Hettesheimer, Mr. McGill is not eligible for health care coverage that is automatically provided to those on disability retirement. He now pays $419 per month for health coverage for himself and his wife. Members of PERS who become disabled before age 60 continue to receive free health care for the rest of their lives.

Carl George lives in Hamilton, Ohio. He is a U.S. Navy veteran of the Normandy invasion in World War II. He worked as an auto mechanic until his employer went out of business. Beginning in 1977, he worked for 8 years as an auto mechanic for the sheriff of Hamilton County until injuries and arthritis in both knees made it impossible to work in his occupation. Although he had always planned on working until he could retire with full benefits he was forced to apply for retirement after PERS advised him that he was too old for disability benefits.

At the time of his retirement Mr. George had been earning $19,000 per year. Had he been eligible for disability benefits he would have received monthly income of $475. Instead, with the military service credits he purchased from PERS he receives $259 per month.

The Ohio Plans

In addition to the Public Employees Retirement System (PERS), there are two other similar retirement plans for governmental employees. Both the State Teachers Retirement System (STRS) and the School Employees Retirement System (SERS) also deny disability benefits to members after age 60 while continuing full benefits for life to those members disabled before reaching 60.

There are nearly one million members in these three retirement systems. While the number of members is very great, the impact of the proposed legislation on these plans will be minimal compared to the misery of those few members excluded because of their age. Only those members who become disabled after age 60 who have more than 5 years service and less than 15 years service credit are affected by the age 60 disqualification. Those with less than 5 years service are not eligible for either retirement or disability. Those with over 15 years service receive greater benefits on retirement than they would on disability. The number of employees who begin their careers with the state late in life is too small to have a significant impact on the fiscal stability of the retirement plans should they become eligible for disability benefits.

In June Betts' case, the additional cost to the PERS plan had she been eligible for disability benefits was $196.52 per month or $2358 per year. Compare this to PERS' assets of over $1,000,000,000 and its payments of retirement benefits of $336,443,286.01 and disability benefits of $39,772,278.07 in 1984.[1]

While the disability plans are open to all individuals under the age of 60 with at least five years of service credit, those individuals, such as June Betts, who apply after their 60th birthday are denied disability benefits. Thus, a worker disabled at age 23 may still be receiving 75% of his salary in disability benefits at age 65, while a worker disabled at age 65 will receive no disability benefits and retirement benefits as low as 10%.

Membership in PERS is in lieu of participation in the federal Social Security program. Thus, while most private company employees have pensions in addition to Social Security benefits, most public employees receive only their PERS benefits. For those who receive both Social Security benefits and PERS retirement benefits, the Social Security benefits are reduced by an amount equal to two-thirds of the PERS benefit.

In addition to lower benefits, workers disabled after age 60 are denied two other benefits due to their exclusion from the PERS disability plan:

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[1] Supreme Court Brief of PERS, pages 5-6.

1. Those with less than 10 years service are denied free medical coverage for life.
2. Each person excluded from the disability plan is denied a five year leave of absence with a guaranteed right to return to his or her former job or its equivalent with his or her former employer. This right is available to all workers receiving disability benefits but not to workers on service retirement.

In addition to the class action brought by members of PERS, STRS and SERS, the EEOC also has a class action against these plans. The members of these class actions all will lose their rights to disability benefits and health care unless retroactive legislation is passed without delay.

Prompt Action Is Required

Prompt action is required in order to rescue the victims of the Supreme Court's decision in Betts. H.R. 3200 provides retroactive application to "all actions or proceedings brought under the [ADEA] after June 23, 1989, and actions or proceedings brought under such Act prior to June 23, 1989 which were pending on June 23, 1989." The courts have generally recognized this type of retroactive legislation as long as the proceedings are still pending at the time the legislation becomes law. Where proceedings have proceeded to final judgment, plaintiff's only recourse is to seek relief from the judgment or file a new lawsuit. These efforts have generally been unsuccessful.

The EEOC has reported that it has 30 cases now pending in federal court that involve allegations of benefits discrimination. These cases, as well as many private lawsuits, are all at risk unless retroactive legislation is promptly passed. The courts are already beginning to dismiss some of these lawsuits based on the Betts decision. Once their appeal time has run, it is unlikely retroactive legislation will benefit the very people it was intended to aid. It is essential that H.R. 3200 become law this session.

H.R. 3200 Should Be Passed Promptly Without Change

As introduced, H.R. 3200 has a single purpose; to overturn the Supreme Court's decision in Betts. This is not new legislation requiring extensive study. H.R. 3200 would merely restore the EEOC regulations (29 C.F.R. § 1625.10) which were rejected by the Supreme Court. Unlike new legislation whose effect is uncertain, the impact of this Bill is known since the regulations have been in effect for 20 years and in their present form for 10 years. Thus, extensive study and further hearings is unnecessary.
As Senator Heinz observed, "for 20 years since the enactment of the ADEA, businesses have been comfortably operating under these

regulations."[2] Senator Metzenbaum noted that the Supreme Court's decision "reverses 20 years of settled law, including regulations supported by the Johnson, Nixon, Ford, Carter, Reagan and Bush administrations, and the unanimous judgment of five United States Courts of Appeals."[3]

Even, the Equal Employment Advisory Council, a nationwide association of employers and trade associations which filed a friend of the court brief on behalf of PERS, has advised employers to rely on these EEOC regulations:

> "[s]ince the 1978 Amendments to the ADEA extended ADEA protection to age 70, employers may no longer engage in the common practice of completely cutting off long-term disability benefits for all disabled employees and long-term coverage for all active employees at age 65. However, employers may lawfully reduce long-term disability benefits for older employees who are under 70 when such reductions are cost justified." (emphasis added)[4]

This is not radical new legislation you are now considering. You are being asked to codify regulations which have been in place for 20 years and which business and industry have adhered to, with only a few exceptions.

It is vital that H.R. 3200 be passed without delay. In addition to the 30 cases being litigated by the EEOC, there are many more private actions similarly affected by this legislation. As the courts dismiss these cases in reliance of the Supreme Court's Betts decision, those dismissals will become final judgments. While H.R. 3200 provides for retroactive application, my research shows that the courts have not applied retroactive legislation to those cases which have proceeded to a final judgment.

Attached are letters from Anna Hettesheimer, Robert McGill, Nancy McGill, James Thomas and Carl George who are unable to attend these hearings because of illness. I ask they be made a part of the record.

Prompt passage of H.R. 3200 is crucial to them, to June Betts, and to others negatively impacted by the Betts decision.

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[2] 108 Cong. Rec. S7687 (daily ed. July 11, 1989).

[3] 108 Cong. Rec. S9550 (daily ed. Aug. 3, 1989).

[4] AGE DISCRIMINATION IN EMPLOYMENT ACT: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners p.339. Published by the Equal Employment Advisory Council (1982).

Dear Sirs

I would like to express my feelings and concerns regarding my situation. I worked for the Hamilton County Board of Mental Retardation a job which I obtained in 1979. My husband became ill and had to go on total disability. I had to go back to work in order for us to live. I belonged to the PERS retirement, I worked for them for over nine years when in May 1988 I became ill with cancer. I had to quit work because of my illness and filed for total disability. I was refused by PERS because I was over 59 years of age

I held off filing for retirement until after my 10 year Anniversary, March 1989, on filing PERS would not give me any health coverage because I was not on the payroll since August 1988 was when my sick days were used up They considered my termination when my sick days ran out and back dated my retirement to August 1988

When my health coverage ran out, February 1989, I was put on the COBRA Plan which I pay 179^{30} a month In July 1990 my COBRA runs out. I will be 64 yrs old and not eligible for Medicare. Where do I go from there. No one will pick me up with an existing disease and with the cost of health care I will not be able to afford treatments

I have had health care coverage for many years and was fortunate not having to use it. Now when I need it the most in my life I am being denied because of my age.

I am at a stage in my life when I should be able to enjoy what's left of my life and have less worries, but in my case it is not so. My worries and concerns have compounded more than any time in my whole life. I got a disease which has disabled me eight months too early and after age 59.

Sincerely

Ann Hettesheimer

September 15, 1989

Subcommittee On Employment Opportunities
102 Cannon
House Office Bldg.
Washington D.C. 20505

When my husband was told he had inoperable lung cancer we were devestated.

We had been remodeling our summer home and planned to move there when Bob retired the end of 1989. This would give him 10 years and a small pension and our hospitilization paid by PERS. We thought we had things well planned.

Bob tried to continue working while taking radiation treatmants but found it too difficult with all the side effects. He also had surgery similar to open heart surgery to implant radioactive seeds as a preventive measure. His lung collapsed twice, he had numerous infections, a massive bleeding spell and then developed shingles.

Through all this he has maintained a very positive attitude and continued fighting to have as normal a life as possible under these circumstances.

While he was in the hospital, our house was sold in Hermitage, we moved into our unfinished summer home, added a bedroom and bath on the first floor and have had months of extra work, confusion and expense.

The problems of being turned down by PERS have just compounded our situation.

When you are so sick, other problems simply add to your already heavy burden. Cancer is an emotional disease as well as physical and these monetary problems have made Bob's recovery more difficult.

We feel we deserve the paid hospitilization and appreciate your consideration.

Thank you.

Sincerely yours,

Nancy M. McGill

Nancy M. McGill
(Mrs. Robert E. McGill)

September 15, 1989

Subcommittee onEmployment Opportunities
402 Cannon
House Office Bldg.
Washington D.C. 20515

I have been hospitalized and confined to my home with lung cancer since August 1988. I used all my accumulated sick leave and vacation and on March 31 of 1989 was forced to retire as Director of the News Service at Youngstown State University, where I has been employed since November of 1979.

My request for disability retirement was denied by Public Employees Retirement System of Ohio and the University because I was over 60 years of age. (63) This is clearly discrimination because of my age.

I am presently receiving $686 a month from Social Security and have to pay $410 a month for my hospitilization.

current
In addition to the/monetary loss, losing the disability pension will cost me many thousands of dollars in hospitilization from PERS. Upon finishing the (10) years at YSU (nov. 1989) I would have been eligible for free hospitilization the rest of my life from PERS.

The loss of my job and regular pay check plus the hassels over the disability question have made me very upset. I am on oxygen 24 hours a day as a result of my lung cancer plus large amounts of medication. The stress and concern over the disability rejection has greatly increased my breathing problems and physical well being.

Thank you for your consideration.

Sincerely,

Robert E McGill

Robert E. McGill
Box 383
Tionesta, Pa. 16353

Sept. 13, 1989

Dear Mr Martinez

I was an employie of the Hamilton County Sheriffs Dept. I was told by my employer that I was not elegible for disability retirement because I was 60 years old, and forced to take a voluntary retirement through PERS on December 16, 1985. In February 1986 I paid to PERS $1917.98 to receive service credit of 2.252 years, and now I am receiving $259.53 monthly from PERS Also I am receiving $444.00 from Social Security. Under PERS disability retirement I would receive 30% of approximate $19,000, or about $475.00 per month. The extra money would help us very much. We are at or below the poverty level. We purchased a used Mobile

Home with our savings. The lot rent increases every year. This mobile Home is a 1973 model. I am driving a 1979 model car which needs frequent repairs, and maintenance. Our needs for dental and eye care are a luxury we cannot consider.

I am presently 65 years old and totally unable to work.

I hope you will do what you can to reverse the Supreme Courts decision on the Betts versus P.E.R.S. case. Which would help me, and others like me.

Thank You
Sincerely
Carl George

July 9, 1989

Hon. Howard M. Metzenbaum
140 Russell Senate Office Bldg.
Washington, D. C. 20510

Dear Senator:

Last month the U. S. Supreme Court heard a case, Public Employees Retirement System of Ohio vs. Betts: I was a part to this class action. The attorney who represented Ms. Betts has advised that you are contemplating legislative action to correct the injudicious decision of the court. I hope the information I'm enclosing will assist you in correcting this form of age discrimination.

On September 25, 1985 I was placed on involuntary sick leave by my supervisor at Sinclair Community College, 444 W. Third St., Dayton, Ohio 45402, where I was employed for more than ten years.

For the next several days, weeks and months my efforts to return to my job were rebuffed by my employer. My huge backlog of sick leave and vacation time was being exhausted. Finally, in an effort to make certain I would have an income, I filed with the Public Employees Retirement System a request for a disability retirement. I was 63 years of age at this time. In a letter from the Public Employees Retirement System (PERS) I was informed that age 60 members were no longer eligible for the disability benefits of the program. As a result of this situation I was compelled to accept the standard retirement which provided far less money. My retirement date was March 1, 1986.

Another fringe benefit provided employees at Sinclair Community College was an insurance policy with Teachers Insurance and Annuity Assoc., P. O. Box 1668, New York, N. Y. 10164 (TIAA). Here again I suffered age discrimination. I was advised that those age 60 or older could collect disability benefits for only five years while those under 60 could receive disability benefits for the remainder of their lives.

It seems so improper for elderly people, at the time in their lives when they most need disability benefits to be denied them by actuarial tables.

Thank you for your early attention to this matter.

Sincerely,

James F. Thomas
1122 S. Miami St.
West Milton, OH 45383

cc: Robert F. Laufman, Atty.

Senator **METZENBAUM**. I just want to ask you, Ms. Betts, do you think the decision of the Supreme Court is fair?

Ms. **BETTS**. Absolutely not. My mother earned benefits the same as anyone else did. I am sure she had absolutely no idea when she joined the Hamilton County Board of Mental Retardation that she could be denied disability benefits after she was 60 years old.

No one would try to deny any kind of benefit to someone on the basis of race. They couldn't have said that because she was a woman and not a man she wasn't entitled to disability benefits. So I don't know why for the same number of years of service she couldn't have qualified for disability.

Senator **METZENBAUM**. I thank you very much for your comments. I might say, Ms. Betts, that you must be very proud of your mother, because I read the statement and you indicated that when she was seven years old, I think you said, her father passed away.

Ms. **BETTS**. That's right.

Senator **METZENBAUM**. And she lost all of the economic wherewithal, yet she went on to have that which was unquestionably a very successful life. She was well-educated and did well in the economic arena. You should be very proud of her, and I am sure she is proud of you for being here today testifying on her behalf. And we appreciate it.

Ms. **BETTS**. Well, thank you very much. The only thing I regret is that she is going to have to go on Medicaid. I really wish we didn't have to put her on Medicaid. It just is something that she would have been very ashamed of doing, and I am very sorry about that.

But thank you very much.

Senator **METZENBAUM**. Thank you.

Now, I am going just to finish with Mr. Sousa and then I will open the floor to other members of the committee.

Mr. Sousa, were you a member of the United Rubber Workers Union?

Mr. **SOUSA**. Yes, sir.

Senator **METZENBAUM**. Was the union supportive of your case?

Mr. **SOUSA**. Not on this case, sir.

Senator **METZENBAUM**. They were not involved in this?

Mr. **SOUSA**. They helped us in the health benefits case. They paid for the litigation for that because we didn't have any money in our books. So we asked them to help us.

Senator **METZENBAUM**. But is it the fact that they supported the position you took but did not provide financial support?

Mr. **SOUSA**. Right. Yes, sir.

Senator **METZENBAUM**. Senator Pryor.

Senator **PRYOR**. Yes. Thank you, Mr. Chairman.

You know, we all read about these cases and we see them in the paper. We have certainly read a lot about the *Betts* case. We read the decision of the Supreme Court. But today really humanizes the issue, to see the real people and the families involved.

I must say that I am stunned when I think of Mr. Sousa's situation. How many people in the plant received the cutoff date and then had their retirement or severance lessened? How many people like you were there, Mr. Sousa?

Mr. **SOUSA**. There were 54, sir.

Senator **PRYOR**. How many?

Mr. Sousa. Fifty-four.

Senator Pryor. And you had been there for over 33 years?

Mr. Sousa. Thirty-three years, sir.

Senator Pryor. I am curious about the great reduction in severance that you received when they subtracted your retirement benefits. What happened to the balance of the severance pay? Do the employers just keep that money? What happened to that?

Mr. Sousa. I believe so.

Senator Pryor. Because you're talking about two separate funding mechanisms.

Mr. Sousa. Yes, sir. Right. They took the vested pension fund from the separation pay. And what they did with it I don't know. But they took this money from each person. Some was quite a large amount and others were a little less.

Senator Pryor. Do you happen to know if any of those benefits that frankly were taken away from you—and, I think, illegally—were they transferred to other facilities of the same company?

Mr. Sousa. No, sir. They didn't want us in any other factory.

Senator Pryor. So is it your assumption then that the owners of the company basically pocketed the benefits?

Mr. Sousa. I believe so. I couldn't say what they did with the money, but I believe they just took it, and we don't know what they did with it.

Senator Pryor. Well, we are privileged to have both of you here today. If you could testify before the entire House and the entire Senate, I think we would probably get about 535 members in favor of correcting the *Betts* decision. We are open to suggestions which will strengthen S. 1511 and make it better.

I have several questions, but we have so many here, Mr. Chairman, that I think that I will yield.

Senator Metzenbaum. I notice the time is running. I would appreciate that, Senator Pryor. As a matter of fact, it's 11:20, but I do want to offer the members of the committee a chance to make such inquiries as they wish.

Senator Jeffords. I would defer to my more senior members.

Senator Metzenbaum. Senator Heinz.

Senator Heinz. Mr. Chairman, I think that the case of Ms. Betts and Mr. Sousa have been very well brought out by your questions.

I just want to add one thing, Ms. Betts, to what the chairman said about your mother. And that is that she was also a great mother.

Ms. Betts. I think so.

Senator Heinz. As to your cases, I think you have both performed a tremendous service to the committee in making it very clear what the human results and costs in both monetary and emotional are when something very unexpected and quite uncalled-for happens and pulls the rug out from under your family. And we thank you for making that crystal-clear.

Thank you, Mr. Chairman.

Senator Metzenbaum. Thank you very much, Senator Heinz. Senator Graham.

Senator Graham. No questions.

Senator Metzenbaum. Senator Kassebaum.

Senator Kassebaum. Thank you, Mr. Chairman.

I too would like to say I think it has been very compelling testimony and certainly brings it home when you hear in actual cases what has happened.

And I would just like to add, Ms. Betts, too that I think your mother in her struggle to go back to work—and I think you spoke to that very well—and the disadvantages that are inherent even as a displaced homemaker, so to speak, when she enters the work force and is not able to develop the pension programs and so forth that many workers such as Mr. Sousa who had certainly had a record of long employment and then see it fade away at a time that he was most in need.

So I think that while all of us believe immediate legislative solution is important in this particular situation, I think the purpose of this hearing is for all of us, and to share with you and the other witnesses who will testify, what is the best legislative solution so that we don't create other problems as we try to fix this particular situation.

So I value the testimony that has been offered and thank the witnesses.

Senator **METZENBAUM**. Thank you very much, Senator Kassebaum.

Senator Jeffords, did you have questions?

Senator **JEFFORDS**. Just a comment, Mr. Chairman.

I think that as well as pointing out the problems with the *Betts* case, I think we should recognize that the problems of early retirement forced upon people involuntarily are as serious a matter as the *Betts* case made it even look more serious. I think we ought to keep that in consideration as we move along to other issues.

Senator **METZENBAUM**. Thank you very much, Senator Jeffords.

Mr. Sousa, just one clarifying question because I am not sure that the record is clear. As I understand it, the union did agree with your position but did not finance the lawsuit. Is that correct?

Mr. **SOUSA**. That is our international union. Our local union did support us and wrote a letter to the EEOC in support, which I have attached to my statement.

Senator **METZENBAUM**. Well, thank you very much, and we appreciate the contribution that both of you have made. We hope to rectify the situation.

Mr. **SOUSA**. Thank you.

Ms. **BETTS**. Thank you.

Senator **METZENBAUM**. Our next witnesses are R. Gaull Silberman, vice chairman, Equal Employment Opportunity Commission, and Charles Shanor, general counsel of the Equal Employment Opportunity Commission, Washington, DC.

Ms. Silberman, we are happy to hear from you. It's my understanding your statements are relatively short. Please proceed.

STATEMENTS OF R. GAULL SILBERMAN, VICE CHAIRMAN, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC; AND CHARLES SHANOR, GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WASHINGTON, DC

Ms. **SILBERMAN**. Thank you, Mr. Chairman. Good morning.

I am Ricky Silberman, the Vice Chairman of the Equal Employment Opportunity Commission, and we want to thank you for asking me and the EEOC's general counsel, Charles Shanor, to testify today.

On June 23, 1989, the Supreme Court handed down its decision in the *Betts* case, invalidating the EEOC's longstanding interpretation that the Age Discrimination in Employment Act prohibited discrimination against older workers with respect to employee benefits. S. 1511 and S. 1293 would amend the Age Act to explicitly prohibit such arbitrary age discrimination, and I welcome this opportunity to give the EEOC's views on this very important legislation.

This morning, Carolyn Betts has eloquently described the devastating effects of benefits discrimination. As Mr. Sousa testified, his case, *Albenante v. Fulflex*, in which the EEOC intervened, was dismissed on September 20 because of *Betts*.

This morning, Senators, we have heard about the effects of this decision on two people. But these effects, Senators, spread far and wide. And the reason they spread far and wide is because older workers are a growing and vital segment of our Nation's work force and benefits have become an integral part of their compensation, no longer the frosting on the cake. Many of these benefits are, as a practical matter, unavailable to individuals on the open market, and for older workers particularly. And I think Ms. Betts made the point with respect to women older workers who have entered the work force late. Employment often means the only access to these crucial benefits and therefore, it is crucial that discrimination not be allowed in these benefits.

The Age Act, which the EEOC enforces, protects older workers against discrimination in hiring, firing, compensation and terms and conditions of employment. We, the EEOC, see no good policy reason for allowing arbitrary, unjustifiable discrimination against older workers in the area of benefits when all other aspects of their employment are covered.

Now, concerns have been raised before and will be raised today with respect to the proposed legislation. Let me state at the outset that we believe that prompt legislative action is needed to return the law to its pre-*Betts* status and to protect older workers from further uncertainty about their future.

First let me comment on the effects of the *Betts* decision on the EEOC's enforcement effort. We have some 30 cases currently in litigation that are affected by *Betts*, and the general counsel is going to comment on those more specifically.

But we also have 406 open charges that raise benefit issues, and until these charges have been thoroughly investigated and the determinations on the charges have been issued, we really can't estimate how many people are affected or how much money is involved.

We do know that benefit cases by their very nature are large class cases in which many people and very large amounts of money are involved.

To turn to the *Betts* case, the EEOC argued to the Supreme Court that the State of Ohio had unlawfully deprived June Betts of disability benefits because of her age, because the employer had failed to prove or even offer any economic justification for this denial.

We urged the Supreme Court to restore these crucial benefits to Ms. Betts under the principles of our Interpretive Bulletin. But the Supreme Court rejected that argument, holding that age-based benefit denials under bona fide benefit plans are "exempt from the prohibitions of the ADEA" unless the plans discriminated in a "non-fringe benefit aspect of employment."

S. 1511 and S. 1293 would bring benefits back under the coverage of the Age Act. Both bills would revise the section 4(f)(2) defense by eliminating the subterfuge language for benefit plans and codifying the Interpretive Bulletin's equal cost principle.

The EEOC believes codifying this equal cost principle would provide the most appropriate rule for determining when age differentials should be permitted in benefit plans consistent with purposes of the Age Act, with the significant exception which I will speak to in a moment.

Now, Senators, opponents of these bills have questioned the consistency of the executive branch interpretation. The Interpretive Bulletin's equal cost principle was first promulgated in 1969 and reissued and expanded in 1979. One could, one can, question the accuracy of this interpretation. The Supreme Court did, and the Congress will in passing legislation, have its own answer to this.

But the only in consistency in evidence here is in the criticism. The EEOC in both guidance and litigation has consistently said that the IB has provided a workable, fair framework for evaluating benefit plans.

But a number of developments after 1979 were not envisioned in the Interpretive Bulletin. The Age Act has been amended several times, most notably with respect to mandatory retirement, and ERISA has been passed, TEFRA, DEFRA, COBRA. That is why in July of 1988 the EEOC issued two advance notices of proposed rulemaking in order to have the necessary information about employers and employees' experiences under the Interpretive Bulletin and to inquire about the recent spate of early retirement incentive programs; in other words, to evaluate the continued appropriateness of our guidance.

The comments we received from employers and employee representatives alike, with one salient exception, generally express support for the basic provisions of the Interpretive Bulletin and support for the concept of the desirability and legality of early retirement incentives. The EEOC was in the process of evaluating the comments and considering its options when the Court handed down *Betts*.

During this same period, the Second Circuit Court of Appeals, in a case called *Cipriano*, asked the Commission to comment on the legality of early retirement incentive plans. And you will hear a little bit more about this later today from other people who are testifying.

The Court questioned whether the Interpretive Bulletin applied.

Senator METZENBAUM. Could you wind up, please, Ms. Silberman?

Ms. SILBERMAN. Yes. I just have——

Senator METZENBAUM. Another six or eight pages?

Ms. Silberman. No; another page. Can I go on with my other page, Senator?

Senator Metzenbaum. Go ahead.

Ms. Silberman. Thank you, Senator.

In our brief as amicus curiae in this case the Commission concluded that the Interpretive Bulletin's "equal cost" rule was not intended to apply to early retirement incentive programs and is ill-suited to this type of voluntarily chosen benefit. And that position, our position, was adopted by the U.S. District Court in that case.

I think it's important to make this point: Early retirement plans, if truly voluntary, can provide valuable additional benefits and expand options for older workers, allowing them to gain the financial resources to take early retirement, to move on to new employment elsewhere and to avoid involuntary termination.

If such plans further the purposes of the ADEA, the EEOC believes they should be lawful. But conversely, the Commission believes that plans that do not further the purposes of the ADEA should not be lawful. And a good example of that was the *Carlin* case that the Seventh Circuit decided. That case didn't involve an incentive, it involved a disincentive. It involved a denial of benefits.

Under S. 1293 and S. 1511, some voluntary retirement incentive plans may be rendered unlawful by section 4(f)(2)(b). We have concluded that that is true, and we believe it quite strongly. To the extent that such programs are challenged, we believe that their legality can best be adjudicated on a case-by-case fact-specific basis in light of their intent and actual operation.

If this language is added to the bill, we support the bill. We think that the bill is necessary to restore employment rights of great value to older workers, and we commend the Congress and look forward to working with the committee to ensure that these protections are not denied older workers.

Thank you, Mr. Chairman.

[The prepared statement of Ms. Silberman follows:]

PREPARED STATEMENT OF R. GAULL SILBERMAN

Good morning Chairmen and committee members. I am Ricky Silberman, Vice Chairman of the Equal Employment Opportunity Commission. With me is the EEOC's General Counsel Charles Shanor. On June 23, 1989, the Supreme Court handed down its decision in Public Employees Retirement System v. Betts, which invalidated the EEOC's long-held view that an employer may not discriminate against older workers with respect to employee benefits. S. 1511, the Older Workers Benefit Protection Act, would amend the Age Discrimination in Employment Act to make clear that the Act prohibits arbitrary age discrimination in employee benefits, and would codify the principle embodied in the EEOC's Interpretive Bulletin interpreting section 4(f)(2) of the Age Act. I welcome this opportunity to give the EEOC's views on this important legislation. I also note that the Administration may be providing additional comments on the legislation in the near future.

Older workers are a growing and vital segment of our nation's work force. S. 1511 would restore protections older workers have come to expect under the administrative and judicial interpretation of the Age Act that had prevailed for two decades. Fringe benefits are a valuable component of the employment relationship, as significant to the employee as other terms and conditions of employment. We see no good policy reason for allowing arbitrary, unjustifiable discrimination against older workers in this one area when all other aspects of their employment are protected. Amending the Age Act to clarify the prohibition against benefits discrimination is designed to adopt EEOC's prior interpretation of the Act. The Commission believes that prompt legislative action will cause the least disruption to the existing system of employee benefit plans. Moreover, if Betts is not reversed, older workers will face increasing uncertainty about their future benefits.

Before discussing specific provisions of S. 1511, I thought it would be helpful to tell you what we know to date about the impact Betts may have on the EEOC's enforcement efforts. With respect to litigation, the Betts decision affects more than 30 of EEOC's cases now at the trial or appellate levels. This is out of a total of approximately 253 ADEA cases in active litigation. As to administrative enforcement, we estimate that 406 open charges may raise issues covered by the Betts decision.

For reference, we currently have approximately 11,608 ADEA charges, 21.1 percent of the 54,906 total charges in our inventory. Until the charges have been thoroughly investigated and determinations have been issued, we are unable to estimate the amount of money involved.

To turn to the bill, S. 1511 is consistent with the established policies of the EEOC regarding section 4(f)(2) of the Age Act as set forth in the Interpretive Bulletin, issued by the Department of Labor in 1979 and adopted by the EEOC, and with the position we took in the Betts litigation. In Betts, we argued that the employer had violated the Age Act by denying disability benefits to Ms. Betts because of her age. The employer had failed to prove or even offer any economic justification under section 4(f)(2) of the act, that is, that it cost more to provide disability benefits to older workers. Thus we urged the Supreme Court to adopt the Interpretive Bulletin's "equal benefit or equal cost" approach as the proper interpretation of 4(f)(2) in the Betts case.

The Supreme Court, as we all know, not only rejected that argument but also held that age-based benefit denials under bona fide benefit plans that are not a "subterfuge" to evade the ADEA are "exempt from the prohibitions of the ADEA." The Court held a plan could be a "subterfuge" only if it was used to discriminate in non-fringe-benefit aspects of employment. S. 1511 would make clear that the Age Act prohibits arbitrary age discrimination in benefit plans even when the plan is not used to discriminate in other aspects of employment.

S. 1511 also revises the section 4(f)(2) defense. It would eliminate the "subterfuge" language and codify the Interpretive Bulletin's "equal cost" principle as the only way to justify age differentials in benefit plans. With the significant exception I will speak to in a moment, the EEOC believes codifying this "equal cost" principle would provide the most appropriate rule for determining when age differentials should be permitted in benefit plans consistent with the purposes of the Age Act. The Commission also endorses the legislation's codification of the so-called "benefit package" rules of the Interpretive Bulletin which permitted, under specific circumstances, the combination of certain benefits such as life and long-term disability insurance, for purposes of calculating the benefits provided to, and costs incurred for, older workers. The General Counsel will address this aspect of the bill in more detail. But first I think it would be helpful for me to give you some historical background.

Labor Department and EEOC interpretations of section 4(f)(2) of the ADEA have been in effect since 1969 and generally provided a workable, fair framework for evaluating benefit plans. The Interpretive Bulletin has been in effect since 1979, but a number of developments since then have affected the I.B. The Age Act has been amended several times, most notably in 1986 to lift the age-70 upper limit for coverage for most employees. Additionally, since 1979 there has been a proliferation of voluntary early retirement incentive plans. Such voluntary incentive plans were not the focus of concern in 1979 because until the 1978 ADEA amendments, employers could lawfully retire employees involuntarily, solely on the basis of age (if pursuant to a bona fide plan), and under any circumstances at age 65. Thus, the Interpretive Bulletin did not contemplate voluntary retirement incentives.

These changes prompted the EEOC last year to issue two advanced notices of proposed rulemaking to gather information about employers' and employees' experience under the Interpretive Bulletin, and about early retirement incentives. The comments we received in response, from employers and employee representatives alike, generally expressed support for the basic provisions of the Interpretive Bulletin and advocated changes of a technical nature to update it. The EEOC was in the process of evaluating the comments and considering its options when the Court handed down Betts.

The Commission had concluded that the Interpretive Bulletin's "equal cost" rule was not intended to apply to early retirement incentive programs, and is ill-suited to this type of voluntarily chosen benefit. We took this position in Cipriano v. Board of Education of North Tonowanda, which was adopted by the U.S. District Court for the Western District of New York. Retirement incentive plans, ~~if~~ truly voluntary, can provide valuable additional benefits and expand options for older workers, allowing them, for example, to gain the financial resources to take early retirement, to move on to new employment elsewhere, and to avoid involuntary termination. If such plans further the purposes of the ADEA, the EEOC believes they should be lawful. Conversely, the Commission believes plans that do not further the purposes of the Act should be unlawful. For example, EEOC believes that the case of Karlen v. City Colleges of Chicago involved such a plan.

Under S. 1511, some voluntary retirement incentive plans may be rendered unlawful by section 4(f)(2)(B), even though they in fact further the purposes of the Age Act. The Commission believes programs that are completely voluntary and further the purposes of the ADEA as set forth in section 2(b) should remain lawful. To the extent such programs are challenged, their legality can best be adjudicated on a case-by-case, fact-specific basis in light of their intent and actual operation.

S. 1511, with the addition of language which will preserve voluntary early retirement incentive programs, would restore employment rights of great value to older workers.

The General Counsel and I will be pleased to answer any questions you may have.

Senator METZENBAUM. Thank you very much, Ms. Silberman.

Mr. Shanor.

Mr. SHANOR. Yes.

Mr. Chairman, Senators, I am pleased to report that EEOC supported with extensive legal briefs, both June Betts and Harry Sousa.

Because time is short, I will provide only technical comments on these bills and how they reverse *Betts*, and attempt to dispel some misimpressions which may have been conveyed to you about the effects of these bills.

First, *Betts* generally held that age-based discrimination in benefits plans is not actionable under the ADEA. This holding is contrary to longstanding EEOC views. Both S. 1511 and S. 1293 would restore EEOC's position that benefits discrimination is generally prohibited under the ADEA.

Second, *Betts* held that section 4(f)(2) of the ADEA is not an affirmative defense. Again, this holding was contrary to the EEOC's interpretation. Both bills would reverse this holding of *Betts*.

Third, *Betts* held that an employer could engage in benefits discrimination against older workers even when it could not justify the discrimination by increased costs of providing benefits to older workers. These bills restore the EEOC's views that an employer cannot discriminate against an older worker unless the employer can cost-justify this discrimination.

Fourth, *Betts* indicated continuing confusion over the status of pre-ADEA benefit plans under the Act. Both bills would make Congress' intention clear that benefit plans must comply with this Act regardless of their date of adoption. This would reestablish the EEOC's position that pre-ADEA benefit plans are subject to the same legal rules as those which apply to post-Act plans.

Senators, there has been a substantial amount of disinformation disseminated concerning supposed adverse effects and interpretive uncertainties of these bills. Because these bills are consistent with what the vast majority of American employers did for many years before the *Betts* decision, and because they are entirely consistent with pre-*Betts* EEOC interpretations of the ADEA, I believe it appropriate for me to dispel these charges. And I will do so with several of them.

First, there is a charge that these bills favor older workers excessively. Not so. Both bills enable employers to pay equal amounts for each employee's benefits, even though because of age-related cost considerations, an older employee might receive less comprehensive benefits coverage than a younger employee.

By permitting an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee, S. 1511 simplifies an EEOC interpretation which permits the extension of additional benefits to older workers to counteract problems of age discrimination.

Second, it is alleged that these bills would unduly restrict the flexibility of employers to design sensible benefit packages for their employees. This charge also is untrue. Both bills permit employers to combine or package certain benefits for the purpose of calculating the benefits available to other workers. Such packaging, an exception to the normal issue-by-issue, benefit-by-benefit approach generally taken in Title VII and the ADEA toward discrimination, permit some aggregation of like benefits when such grouping enhances employee welfare.

Neither bill fully disposes of the dispute concerning severance pay for retirement-eligible employees, under the theory that these benefits are really one integrated benefit. As you may know, of course, EEOC has asserted in several cases that severance pay and vested pension benefits cannot be considered as one integrated benefit because they serve separate and distinct purposes.

Third, a concern has been raised that these bills would forbid establishment of a normal retirement age for benefit plan construction purposes. Both section 4(i) and ERISA permit use of such minimum retirement ages, and there is nothing in these bills which would disturb this settled issue.

Fourth, both bills leave unchanged the whole range of pre-*Betts* judicial constructions and EEOC interpretations of the ADEA. For example, 5-year bracketing, coordination of private and governmental benefits and provision of bridge payments until an employee becomes eligible for Social Security would continue to be permitted to the same extent as before.

Moreover, it is not true that EEOC has denied the legitimacy of generally accepted actuarial practices in planning employee benefit programs.

We therefore perceive that these bills generally open no closed issues and close no open issues. As the Vice Chairman noted, there is one salient exception: EEOC is concerned that some early retirement benefits valuable to older workers might be eliminated by these bills. And we would be willing to address that further.

Finally, I wish to address the fact that S. 1511 would apply to pending actions or proceedings and S. 1293 would not, at least on the face of the bill. EEOC has over 30 cases pending in trial and appellate courts around the country challenging benefit plans as unlawful under the ADEA.

These cases affect many thousands of employees. We currently estimate that over half of these cases would require dismissal in light of *Betts*, without remedial legislation. Another quarter might survive *Betts* in reduced form. And the final quarter we need more discovery in the cases.

Recently, EEOC received two orders denying requests to stay these cases pending actions on these bills. And on Monday we received the first judicial order dismissing one of our ADEA benefits cases, the *Albenante v. Fulflex* case that Mr. Sousa is involved in.

While section 5 of S. 1511 would preserve these pending cases, if there is a desire to aid June Betts and other individuals whose cases are pending, we would urge expeditious passage of legislation to accomplish this purpose.

Thank you.

[The prepared statement of Mr. Shanor follows:]

PREPARED STATEMENT OF CHARLES A. SHANOR

Mr. Chairman, Committee Members. I am Charles A. Shanor, General Counsel of the Equal Employment Opportunity Commission, and I am here today to testify concerning S. 1511, a bill designed to restore pre-_Betts_ executive branch interpretations of ADEA Section 4(f)(2). Since Vice Chairman Silberman has provided you with a broad overview of EEOC's views on this bill, I will limit my remarks to technical comments on the major provisions, and offer my opinion on how these provisions "reverse" _Betts_. I would also like to note that the Administration may be providing additional views on this legislation in the near future.

First, Public Employees Retirement System of Ohio v. Betts generally held that age-based discrimination in benefits plans is not actionable under the ADEA. This holding is contrary to EEOC's Interpretive Bulletin. S. 1511 would restore EEOC's position that benefits discrimination is generally prohibited under the ADEA by defining "terms, conditions and privileges of employment" in section 4(1) to encompass all employee benefits.

Second, Betts held that section 4(f)(2) of the ADEA is not an affirmative defense but part of the employee's prima facie case. Again, this holding was contrary to the EEOC's interpretation. S. 1511 would reverse this holding of Betts, and restore EEOC's view that an employer has the burden of proving that such benefits discrimination is nevertheless authorized by the ADEA.

Third, Betts held that an employer could engage in benefits discrimination against older workers even when it could not justify the discrimination by increased costs of providing benefits to older workers. S. 1511 restores the EEOC's view that an employer cannot discriminate against an older worker unless the employer can justify the discrimination by significant age-related cost considerations.

S. 1511's affirmative defense restores the EEOC's position that an employer may "observe the terms of a bona fide employee benefit plan where... the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker...."

Fourth, Betts indicated continuing confusion over the status of pre-ADEA benefit plans under the act. In United Airlines v. McMann, the court had held that such plans were never covered by the ADEA. In Betts, the court declined EEOC's invitation explicitly to reject that holding. S. 1511 would make Congress' intention clear on this point by enacting statutory language requiring that "A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan." This would reestablish the EEOC's position, 22 years after passage of the ADEA, and after Congress in 1978 said it intended to apply the ADEA to pre-Act plans, that pre-ADEA benefit plans are subject to the same legal rules as those which apply to post-Act plans.

Other portions of S. 1511 are consistent with pre-Betts EEOC interpretations of the ADEA. For example, the bill enables employers to pay equal amounts for each employee's benefits even though, because of age-related cost considerations, an older employee might receive less comprehensive benefits coverage than a younger employee. By permitting an older employee to receive greater benefits or an employer to incur greater costs for an older than for a younger employee, S. 1511 simplifies EEOC's interpretation at 29 CFR 1625.2(b), which permits the extension of additional benefits to older workers to counteract problems of age discrimination.

Additionally, S. 1511 would codify the EEOC's "benefit package" interpretation at section 1625.10, title 29, Code of Federal Regulations, which, as Vice Chairman Silberman has said, would, under specific circumstances, permit the combination of certain benefits for the purposes of calculating benefits provided to older workers. "Packaging" of benefits is an exception to the normal issue-by-issue, benefit-by-benefit approach of Title VII and the ADEA towards discrimination and permits some employer flexibility to aggregate like benefits when such grouping would enhance employee welfare. "Integration" of benefits is a term used by some employers to restrict short-term severance pay when employees are eligible to receive vested pension disbursements. This falls outside EEOC's concept of "benefit package."

Finally, I wish to address the fact that S. 1511 would apply to pending actions or proceedings. EEOC has over thirty cases pending in trial and appellate courts around the country which challenge benefit plans as being unlawful under the ADEA. We currently estimate that over half of these cases would require dismissal in light of Betts absent remedial legislation. Another quarter of the cases, we believe, will survive Betts, though these generally would be narrowed significantly by Betts. The final quarter of these cases cannot be assessed accurately until further discovery is completed. Section 5 of this bill would preserve these pending cases.

If the Committee has any questions, I would be delighted to answer them as best I can.

Senator METZENBAUM. Thank you very much, Mr. Shanor.

I might suggest to you that as a former practicing lawyer, I think you ought to file a motion for a rehearing in the Sousa case and see if that can't be delayed until such time as Congress addresses this issue, because I do believe that if Congress addresses it, we will deal with pending matters, and for this Senator, who is opposed to retroactive legislation affecting former contracts, I don't see that as this. I think it would be entirely appropriate for us to do so and would attempt to prevail upon my colleagues to do just that.

So I would like to see you keep the Sousa case extant. Okay?

Mr. SHANOR. Thank you very much for that suggestion, Senator Metzenbaum. We greatly appreciate it.

Senator METZENBAUM. I hope we can move this rapidly.

Ms. Silberman, just a couple of questions. I understand you received comments on the Interpretive Bulletin in 1988 from the Equal Employment Advisory Council (EEAC), an organization representing a substantial cross-section of employers and trade associations that has been a leading business spokesperson on issues of equal employment opportunity, including employee benefit plans.

It is worth noting that the EEAC fully endorsed your rule as a matter of congressional intent and public policy. I want to quote at some length from the EEAC comment:

"The Department of Labor issued the original Interpretive Bulletin in 1969, embracing an interpretation of section 4(f)(2) that was well grounded in the legislative history of the ADEA. The 1969 IB authorized the provision of lesser benefits to older workers under an employee benefit plan so long as similar costs were incurred on behalf of older and younger workers."

Continuing the quote, "When section 4(f)(2) was amended in 1978 to prohibit involuntary retirement, Congress endorsed the equal cost principle. Although Congress has amended other portions of the ADEA in the past 10 years, section 4(f)(2) has remained untouched. Thus there is no basis for changing the previous position which is reflected in the existing IB.

"Moreover, a number of appellate courts have adopted with approval the IB's equal cost principle. The economic basis underlying section 4(f)(2), that some benefits are more costly to provide to older workers, is as valid today as when the ADEA was enacted. Thus there is no justification for making any substantive change to the guidance provided by the IB other than in those areas where the ADEA has been specifically amended by Congress."

Is that a fair summary of the EEAC position on your regulation?

Ms. SILBERMAN. Well, of course it is an exact quote from the EEAC position, but I think that it is fair to say that it generally reflects what the comments were in the ANPRN with respect to the Interpretive Bulletin. I think they can be summarized by saying, if it ain't broke don't fix it, Senator.

Senator METZENBAUM. Well, let me ask you this question: If that is their position, which appears to be supportive of the legislative position, why are so many business groups making such a fuss about this bill?

Ms. SILBERMAN. Oh, Senator, I really don't think it's probably appropriate for me to characterize why they're doing it. You have several representatives coming up, and I think they can probably answer it better than I.

Senator METZENBAUM. We will ask them then.

Ms. SILBERMAN. Yes.

Senator METZENBAUM. On early retirement incentive plans, I understand your position to be that some plans are lawful and some unlawful under current law. Could you please give me an example of a plan that is unlawful under the ADEA and should remain so, and also, an example of a plan that you believe is lawful but could be jeopardized by the language of S. 1511?

Ms. SILBERMAN. Yes. As I testified in my oral testimony, the plan in *Carlin* was a very good example of a so-called early retirement incentive plan which we believed was unlawful and which we think should remain unlawful. That plan included a diminution of benefits on a sliding scale, and therefore, there was no incentive involved as far as we were concerned.

The plan in *Cipriano*, which was a so-called "window" but one in which there was an enhanced early retirement incentive benefit of some $10,000 that was available to all employees within a certain age bracket, we gave support in both the District and Circuit Court case to that position.

Senator, some ERI's are clearly lawful, those that give a cash bonus to all employees or additional service and credit to all employees. But we believe that implicit in the word incentive is that it makes it more attractive to some people and we believe that the bill really needs language that at least leaves that option open. The key words are voluntary and incentives. Older workers should be able to choose something which makes them better off. And I think that that is the key to lawfulness and unlawfulness.

We don't think ERI's or all ERI's should have to be cost-justified. And as the bills are now written, it is clearly our view that they would all have to be cost-justified.

Senator METZENBAUM. May I interpret your interpretation? Is the position that you have enunciated here today that of the Administration?

Ms. SILBERMAN. Well, our—my testimony and the general counsel's—testimony has been cleared by O.M.B., and as we go along in the process of course there will be more negotiations going on. But it is clearly the position of the EEOC to which no objection has been raised up to this point, and we intend, insofar as the bills as they are reported out and voted on are consistent with what we think is good public policy, we intend to continue to urge that support on the part of the Administration.

Senator METZENBAUM. We appreciate your input and your support. And let me just say as the Chairman of this Subcommittee that I am trying to find some area in which we can work together with the Administration. I think we are on the right track in connection with this legislation, and I hope that we can keep it that way.

Senator HEINZ. Mr. Chairman.

Senator METZENBAUM. Pardon.

Senator HEINZ. Mr. Chairman, eureka, you found one. [Laughter.]

Senator **Metzenbaum**. As I understand Ms. Silberman's statement, I think we're there, but she sounds as if there might be just a little bit of concern, and I think—I hope—we have found one, and if we have, I am ready to roll very rapidly with this.

Senator **Heinz**. Well, Mr. Chairman, there are some people who say that anybody shouldn't agree 100 percent with any of this, the chairman included, that something's wrong. [Laughter.]

Senator **Metzenbaum**. Well, some people might say that, but I wouldn't. [Laughter.]

Senator Heinz, any questions?

Senator **Heinz**. Mr. Chairman, I do have a number of questions, and I want to say that I think the testimony of Ms. Silberman and Mr. Shanor is very refreshing and very helpful to this committee.

I think you have done an extremely good job of covering the central issues.

I do want to ask you about some of the differences other than retroactivity between the two bills that you mentioned, my bill and the bill by Senators Pryor and Metzenbaum. And the question specifically is this: Other than retroactivity, are there any other significant differences between my bill and Senators Pryor's and Metzenbaum's bill that you have not mentioned? You have mentioned at least one other, which was—well, go ahead.

Mr. **Shanor**. Well, it's difficult to say, Senator Heinz, which differences are significant or not. And the first one I would mention is that yours talks about cost considerations and the other bill talks about significant cost considerations. Whether that is an important difference or not, I don't know.

Some that I do believe are clearly important are that your bill contains the subterfuge language with regard to seniority systems that were in the ADEA before, though it eliminates that concept with respect to employee benefit plans. The S. 1511 bill eliminates the concept of subterfuge in both instances.

Senator **Heinz**. And which approach do you prefer, and why?

Mr. **Shanor**. Well, I think, having worked with subterfuge and the difficulties of construing subterfuge for so many years, I think my own preference certainly would be to eliminate that concept in both instances.

Senator **Heinz**. So you prefer S. 1511 on that?

Mr. **Shanor**. On that point, yes.

Senator **Heinz**. The next point?

Mr. **Shanor**. Your bill omits some language, perhaps inadvertently, I suspect, that is currently in 4(f)(2), that a seniority system shall not require or permit involuntary retirement because of age. In that respect, I think I have a preference for S. 1511.

Your bill also does not, I think again, retain the current 4(f)(2) language that no bona fide benefit plan shall exclude the failure to hire any individual. Again I think S. 1511 is technically a little better there.

Your bill differs from S. 1511 on whether or not EEOC's benefit package guidelines would be incorporated. That of course is a policy decision for the Senate.

Senator **Heinz**. Now that is—hold it on that one.

Mr. **Shanor**. I think that's worth talking——

Senator **Heinz**. That's a very interesting issue.

Mr. **Shanor**. Yes.

Senator **Heinz**. That issue has been the subject, as I understand it, and I refer in part to a really excellent analysis provided by the Congressional Research Service which was made available to me and I hope it's available to the other members of the committee. If not, I hope we will make it available to them.

I might just single out some of the CRS geniuses who put it together, such as Ray Schmitt, who is the fellow with the beard back there; and Carol Merck and Kathy Swendamen. And I thank them publicly for the excellent work that they did on this.

As I understand it, this has been an issue that was subject to interpretation. You have come to an interpretation. And I think most of us would agree with your interpretation. It certainly strikes at the heart of the case of Mr. Sousa that we heard a moment ago.

But my question is this: You ended your statement saying that neither bill closes anything that is open or opens anything that is closed. Is that really true with respect to this issue?

Mr. **Shanor**. If what you are saying is with respect to the benefit package issue?

Senator **Heinz**. Yes.

Mr. **Shanor**. I think S. 1511 does accept EEOC's standard interpretation concerning benefit packages.

Now, integration is slightly different.

Senator **Heinz**. That is a separate issue.

Mr. **Shanor**. It's a separate issue. I think that issue remains open. I do believe that the EEOC position which we have taken that you can't integrate severance and pensions is one which is consistent with but different from the benefit package concept. I guess to try to simplify what is a very complex issue as much as I can, what the benefit package concept does is it permits an employer to take two different benefits—disability, life insurance, for example—and put them together in a package and say this package for each employee is equal and therefore ought to be permissible. And our regulations permit that.

Our regulations prohibit the packaging of pensions with other plans, we say, such as severance plans. As I understand the argument of several employers in various bits of litigation, they have said, well, we don't have a severance plan and a pension plan, we have an integrated plan of severance-pension or whatever you want to call it. These are the same thing. Therefore, they're saying not only are we entitled to package these things together, which would violate our rules, they're saying there is really only one benefit. We believe that's wrong. We believe that severance and pensions are quite different, and we have argued that points in briefs.

Senator **Heinz**. And as you have pointed out earlier, they serve separate and distinct purposes.

Mr. **Shanor**. That's right.

Senator **Heinz**. Has that ever been contested and decided unfavorably, from your point of view?

Mr. **Shanor**. We did lose that issue in the District Court in *Albenante v. Fulflex*. And that was on appeal, and we just got a ruling from the Court of Appeals that they were dismissing our appeal in that case because of the *Betts* decision.

Senator **Heinz**. I understand that.

Mr. SHANOR. But if *Betts* were out of——

Senator HEINZ. But prior to that time, had that been litigated?

Mr. SHANOR. Yes. We had won that issue in the *Westinghouse* case. We've won that issue in the *Borden*'s case. Both those were at the Court of Appeals level. And other cases.

Senator HEINZ. Does it prejudice the interpretation that you have won in case after case up to this time for that portion for us not to codify that particular interpretation? Is it prejudicial to you, were we to use the Heinz language as opposed to the prior language?

Mr. SHANOR. I think either bill would leave the issue of integration as opposed to benefit packaging open. You know, some courts might say that because you didn't do something you meant to prejudice it against us. I don't know. We would certainly argue conversely.

Senator HEINZ. As to benefit packaging, you would say that one leaves it open and one leaves it closed?

Mr. SHANOR. Well, actually, on benefit packaging, I would be prepared to argue that the Commission, attempting to maintain as much of our view of the law pre-*Betts* as possible, would certainly stand by the interpretations of benefit packaging and other things even if the Congress were to pass a bill that says nothing on the issue but indicates a strong intent to go back to pre-*Betts* law. The one thing it does is it helps on the benefit-benefit package issue to have it codified because that makes it the law. But I think if it weren't in there, we'd be arguing that's a proper interpretation of the application of cost principles that were generally accepted before *Betts*.

Senator HEINZ. That is very helpful, and I thank you for that.

Let's talk for a minute about retroactivity. And obviously you said that you want the ability. Chairman Metzenbaum has said the same thing. Now, if you were to recommend to us a design for a retroactivity provision, is there anything specific you would recommend? Is there anything, any particular care or concern you would want taken into account in drafting? Or is that a fairly simple matter?

Mr. SHANOR. Well, I wouldn't say retroactivity is ever really a simple matter. I do think that the bill's approach preserving pending cases and charges is an appropriate one in that it sort of leaves things where they were at the time of *Betts*. It says that if you had a timely charge at the time of *Betts* or you had a pending case at the time of *Betts*, that ought to proceed on what Congress believes the pre-*Betts* law to have been and wishes to make effective retroactively, if you will.

We have a couple of concerns, however. One concern is that we may well have some pending charges on which the statute of limitation will expire after the date of the *Betts* decision but before you all pass legislation. And it would be helpful to have a tolling provision that would permit those charges, you know, to simply be tolled for that time period. And that is something we have only recently figured out.

Senator METZENBAUM. Would you submit language to us on that, please?

Mr. SHANOR. Excuse me?

Senator **METZENBAUM**. Would you submit language to us?

Mr. **SHANOR**. We would be delighted to do so.

Second, we do have some concern that other difficulties may come up in connection with cases that are no longer pending if a case is dismissed by a court, which is the effect pending reconsideration or absent reconsideration of the circuit order in *Albenante v. Fulflex*, that we might have to refile the case, that we might have to seek reopening of the case, and the courts may or may not accept arguments that I would expect us to put forth, that those cases are saved just as those that have never been dismissed.

But, you know, courts interpreting that language might say, well, on the date of passage that case wasn't pending, and they might say, though we hoped they wouldn't, that such a case is lost forever.

If you really want to make sure that no case, including June Betts' own case, is decided under the Supreme Court's *Betts* decision, you know, it would be of course helpful to have the most specific language possible on that point.

Senator **METZENBAUM**. The committee would appreciate your suggestions along that line.

Mr. **SHANOR**. Thank you.

Senator **JEFFORDS**. Mr. Chairman, I would like to ask one additional question on that.

What about those cases which the statute of limitations may run out—where there has not been a charge filed or none is pending—between the time of the *Betts* case and the time of the effectiveness of the bill, should we allow those to be run?

Mr. **SHANOR**. Well, I am not sure I fully understand your question, Senator Jeffords.

Senator **JEFFORDS**. In other words, what is the statute of limitations?

Mr. **SHANOR**. Well, the statute of limitations starts to run at the time that a discriminatory action occurs, and there can be some dispute about when that happens. It normally runs out in terms of filing suit in court 2 years after the date of discrimination.

Senator **JEFFORDS**. Well, let me take the example, then: Two years ago today a discriminatory action occurred. They may have been ready but *Betts* comes down and they decide not to. Should that case be lost then?

Mr. **SHANOR**. My view is that that case ought to be preserved. And the reason is the *Betts* decision came out in the newspapers immediately, people might well have been saying, you know, I can't file a charge concerning benefits discrimination now, there's no point in my doing it because of what the Supreme Court decided. And I guess my inclination would be to give the benefit of tolling to people, you know, to simply extend the time frame for whatever that period is for everybody, but not to resurrect claims that were dead on the date of *Betts* because someone hadn't timely filed and it had run out before *Betts* occurred.

Senator **HEINZ**. As I understood your previous answer to me and then to Senator Metzenbaum, the language, the first set of language that he asked you to submit, would cover Senator Jeffords' point.

Mr. **SHANOR**. We would try to design it that way, yes.

Senator **Heinz**. Mr. Chairman, I have one last question, if you will permit me.

Regarding the *Cipriano* case that you mentioned, and in that case EEOC stated in a supplemental brief that early retirement incentives by employers, that in the case of those ERI's employers should be able to show a legitimate business reason instead of being judged solely on cost justification criteria.

Does that apply only to ERI's?

Mr. **Shanor**. Yes, Senator Heinz. Only early retirement incentives, basically because early retirement incentives were not a matter of concern at all in this country as a legal matter before, you know, the very end of the 1970's and the early 1980's, after Congress prohibited involuntary retirement which the Supreme Court had said was okay in the *McMann* decision.

So it really wasn't something that was ever focused upon either in the initial interpretations of the Department of Labor in 1969 or in the expanded Interpretive Bulletin of 1979.

We felt like—and basically just to give you a sense of what came up in the *Cipriano* case—the employer had a plan that said you can get $10,000 if you choose to retire between age 55 and 60 but that's the only time frame in your working career when you can take that particular benefit.

There was an incentive. You know, there were reasons that the employer wanted to provide that particular kind of plan that related to the fact that there was a highly structured-by-seniority pay scale for teachers. And if teachers who were highly paid would leave their place of employment, perhaps to go work someplace else, then the employer could hire less senior but not necessarily younger teachers—and there was no evidence that there was any discrimination against older but new teachers—and the point of the program was to say if you take it during this window and everybody gets a chance to take it during that time period, then fine, take the money and run, it's a benefit not given to anyone under 55 nor to anyone over age 60, but everybody has a chance for that.

If you took the age cap off that, EEOC felt like the incentive would be removed and that the employer would then be giving a $10,000 bonus and that the employer simply wouldn't do that because it would have no incentive, if you will, to provide that valuable benefit to older workers.

Senator **Heinz**. Just to wrap up on that, you mentioned that you think both bills should be amended in order to ensure that ERI's are not disallowed. Are there some ERI's that would be problematic under existing EEOC regulations?

Mr. **Shanor**. Oh, yes. The *Carlin* case is one. There are undoubtedly lots of others that we would say are unlawful.

We have participated in a number of cases where we said ERI's were not voluntary, you know. And clearly *Cipriano* was a case where there was a wholly voluntary kind of program except as to two people who weren't grandmothered in, and we took their side in that case and said those folks were cut out of it altogether because when the program stated they were too old.

Senator **Heinz**. Would you send us some language on that?

Mr. **Shanor**. We would be glad to send you some language on that, yes.

Senator **Heinz**. Thank you, Mr. Chairman.

[The information on ERI's follows:]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, and UNITED FOOD &
COMMERCIAL WORKERS INTERNATIONAL
UNION, AFL-CIO & CLC,

Plaintiffs,

v.

WILSON FOODS CORPORATION, INC.,

Defendant.

Civil Action
No. 88-4056

Judge Michael M. Mihm

MOTION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO STAY PROCEEDINGS

Plaintiff, Equal Employment Opportunity Commission, moves for a stay of further proceedings in this case for a reasonable time (at least until the end of the first session of the 101st Congress, approximately the end of December 1989), pending the outcome of proposed legislation that would eliminate any impact on this case of the Supreme Court's decision in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), for the reasons set forth in the attached memorandum.

Respectfully submitted,

Charlie Hammel-Smith
Trial Attorney

Jean P. Kamp
Supervisory Attorney

John P. Rowe
Regional Attorney

Date: September 12, 1989

Equal Employment Opportunity
Commission
536 South Clark Street
Room 982
Chicago, Illinois 60605
(312) 353-7649

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO & CLC, Plaintiffs, v. WILSON FOODS CORPORATION, INC., Defendant.	Civil Action No. 88-4056 Judge Michael M. Mihm

Notice of Motion

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PLEASE TAKE NOTICE that Plaintiff U.S. Equal Employment Opportunity Commission is today filing the attached Motion To Stay Proceedings, a copy of which is attached hereto.

DATE: September 12, 1989

Charlie Hamel-Smith

Charlie Hammel-Smith

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
ROCK ISLAND DIVISION

U.S. EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION, and UNITED FOOD &)
COMMERCIAL WORKERS INTERNATIONAL)
UNION, AFL-CIO & CLC,)
)
Plaintiffs,)
) Civil Action
v.) No. 88-4056
)
WILSON FOODS CORPORATION, INC.,) Judge Michael M. Mihm
)
Defendant.)

MEMORANDUM IN SUPPORT OF MOTION OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION TO STAY PROCEEDINGS

This case involves a challenge to the severance program implemented by defendant Wilson Foods. The Equal Employment Opportunity Commission (hereinafter "the Commission") filed suit on May 19, 1988, alleging that Wilson Foods' policy of denying severance pay to pension eligible employees 50 years of age and older at plant closing, on the basis of their age, violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 et seq. This case is currently in discovery and the Court has set a discovery cutoff date of October 6, 1989.

On June 23, 1989, the Supreme Court issued a decision in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), which arguably challenges the Commission's position in this litigation. The Supreme Court held that "§4(f)(2) [of the ADEA] ... exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship..." 109 S.Ct. at 2866. This result was contrary to longstanding Commission (and previously Department of Labor) regulations on employee benefit plans, which generally interpreted §4(f)(2) to make such plans lawful only when age-based reductions in benefits were justified by age-related cost considerations. 29 C.F.R. §1625.10. This result was also contrary to the views of every Court of Appeals that had considered the question. See Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 108 S.Ct. 2038 (1988); EEOC v. Westinghouse Elec. Corp., 869 F.2d 696 (3d Cir. 1989); Betts v. Hamilton County Board, 848 F.2d 692 (6th Cir. 1988), rev'd sub nom., Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2584 (1989); EEOC v. Borden's Inc., 724 F.2d 1390 (9th Cir. 1984).

On July 19, 1989, defendant Wilson Foods, allegedly relying on the Betts decision, requested that the Commission dismiss this lawsuit with prejudice and without costs, or face sanctions under Rule 11. (Exhibit 1, attached.) However, the Commission contends that a voluntary dismissal of the instant lawsuit is not warranted. Because the Commission has thus far proceeded on the theories embodied in its regulations, further discovery concerning links to nonfringe-benefit aspects of the employment relationship, and perhaps an amended complaint, may be necessary. It is therefore possible that a viable cause of action, based upon a different theory than has heretofore been articulated, survives Betts. Further, while Betts is of undoubted relevance to this case, questions remain about its precise impact. In particular, the Court did not analyze the question of what constitutes an "employee benefit plan" within the meaning of §4(f)(2). There is, however, significant reason to believe that the Court's interpretation of §4(f)(2) will not survive the current session of Congress.

As of this date, three bills have been introduced to eliminate the impact of the Betts decision. These bills have been earmarked for speedy legislative action; the House of Representatives has already scheduled committee hearings on one such proposal. Because prompt legislative reaction to Betts is likely, the Commission respectfully suggests that proceedings in the instant case be stayed pending the outcome of the current legislative process.

On July 11, 1989, less than three weeks after the Betts decision, Senator John Heinz (R-Pa.) introduced Senate Bill 1293 to eliminate the impact of the Betts decision and "restore the previous regulations under which businesses have been operating for 20 years." 108 Cong. Rec. S.7688 (daily ed. July 11, 1989) (statement of Senator Heinz). This first legislative initiative was followed on August 3, 1989, when Senate Bill 1511 was introduced by Senators Pryor (D-Ark.), Jeffords (R-Vt.), Metzenbaum (D-Oh.), Kennedy (D-Mass.), Bumpers (D-Ark.), and DeConcini (D-Ariz.), "to restore the original congressional intent in passing and amending the [ADEA], which is to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." S. 1511 at 2.[1] Significantly, S. 1511 provides that it would be effective on the date of enactment and would "apply to all actions or proceedings. . .brought under [the] Act prior to June 23, 1989 which were pending on June 23, 1989." S. 1511 at 4-5. Thus, there is no question that, if passed, S. 1511 would apply to this case.

The reversal of the decision in Betts that would be accomplished by S. 1511 could not be more complete. The near-total exemption created by the Supreme Court for employee benefit plans would give way to a requirement that an employer show that, if it provides lesser benefits to older workers, "the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made" on behalf of younger workers. S. 1511 at 3. In addition, the employer would have the burden of showing that its actions are lawful. S. 1511 at 4.

---

[1] A copy of S. 1511 is attached as an addendum to this memorandum. An almost identical bill, H.R. 3200, was introduced the following day. For convenience, we refer throughout this motion only to S. 1511, although the discussion applies equally to H.R. 3200.

Passage of S. 1511 would have obvious ramifications for this case. It would make clear that Wilson Foods' refusal to pay severance benefits must be justified by significant cost considerations. Senate Bill 1511 would therefore establish the legal standards under which the Wilson Foods plan would have to be evaluated.

A reasonable delay in proceedings to allow Congress time to act is fair to all parties in this case and is in the public interest.[2] Considerations of judicial efficiency alone make the case for a stay of proceedings compelling. Consideration of this case with the governing law unsettled would force the Court to commit substantial time and effort in reaching a decision that could shortly be nullified by congressional action. If the case is decided in reliance on *Betts*, and an appeal is taken during the period in which

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[2] Wilson Foods should not be heard to complain that retroactive application to its policy of legislation to eliminate the impact of *Betts* would be unfair. First, the fairness of retroactive legislation is a policy decision properly left to Congress in its deliberations over S. 1511; a stay would simply give Congress the opportunity to make that decision. *See Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[J]udgments about the wisdom of [retroactive] legislation remain within the exclusive province of the legislative and executive branches."). Second, it was *Betts* that upset settled expectations, created by the regulations and lower court decisions interpreting § 4(f)(2). *See, e.g.*, 109 S. Ct. at 2869 (Marshall, J., dissenting) ("[T]he majority casts aside the estimable wisdom of all five Courts of Appeals to consider the ADEA's applicability to benefit programs, of the two federal agencies which have administered the Act, and of the Solicitor General as *amicus curiae*. . . ."). It is not unfair to Wilson Foods to be judged by the standards that were understood to be the law prior to the decision in *Betts*.

Congress, in effect, overrules Betts, the Court of Appeals might well feel constrained to remand the case to this Court for reconsideration in light of the new legislation -- putting the case precisely where it stands right now, but only after the expenditure of significant judicial and governmental resources. Still more problematic, the case might reach final judgment, forcing the Commission to seek relief from the judgment or file a new cause of action if and when Congress acts. Either course involves potential obstacles that could make the claim difficult or impossible to raise, even though, should S. 1511 pass, it would be Congress' clear intent that the new law apply to a case, like this one, pending on June 23, 1989. If this Court does not grant a stay, and the proposed legislation is enacted, it is possible that the result will be the creation of a crack in the law through which this claim may fall. A stay would allow the law to become settled before this Court goes about the business of applying it to this case.

A stay would also represent a sound exercise of this Court's discretion because it would reflect due deference to the legislative process. There is undeniable sentiment in Congress that Betts was a sweeping and entirely unexpected decision contrary to the administrative and judicial interpretations of the ADEA that had prevailed for almost 20 years. Representative Clay termed the decision "an outrageous departure from well settled law under ADEA. . . ." 108 Cong Rec. E.2880 (daily ed. August 4, 1989). As the text of S. 1511 itself notes, the purpose of the bill is to "restore the original congressional intent in passing and amending the [ADEA]." S. 1511 at 2. Senator Heinz said that his bill "would simply restore the previous regulations under which businesses have been operating for 20 years." 108 Cong. Rec. S.7688 (daily ed. July 11, 1989). Senator

Metzenbaum, a co-sponsor of S. 1511, said that "Betts. . . reverses 20 years of settled law, including regulations supported by Johnson, Nixon, Ford, Carter, Reagan and Bush administrations, and the unanimous judgment of five United States Courts of Appeals." Id. at S.9950 (daily ed. Aug. 3, 1989).

It is also clear that the legislative process, which can often grind slowly, is moving with unusual speed in responding to Betts. The first bill designed to overrule the decision was introduced less than a month after Betts was decided; three such bills were introduced within six weeks of the decision. Hearings on H.R. 3200 have already been scheduled by the House Select Committee on Aging, to begin September 21, 1989. There is every reason to expect a swift and decisive legislative verdict on these bills, and therefore every reason to accept a short delay to await that verdict.

Courts have in the past permitted some delay in ongoing judicial proceedings in order to allow the legislature to act on proposals that will have a direct bearing on litigation. The Ninth Circuit in Alaska v. Udall, 420 F.2d 938, 940 (9th Cir. 1960), cert. denied, 397 U.S. 1076 (1970), found it worthwhile to suggest to the district court that proceedings on remand be held in abeyance pending possible action by Congress. As here, there was pending in Congress a bill that "would probably resolve all or most of the issues involved in this complex litigation." See also Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280, 285 n.11 (W.D. Tex. 1972) (action held in abeyance even though no bill that would deal with issue before the court had even been introduced), rev'd on other grounds, 411 U.S. 1 (1973); Vaughn v. Trotter, 516 F. Supp. 902 (M.D. Tenn 1981) (noting that the court had held plaintiff's attorney's fee motion in abeyance to allow Congress to act on legislation that would affect the validity of an award, but was now deciding the motion because the Congress had adjourned and the bill would have to be reintroduced in an entirely new Congress).

Here, with Congress moving swiftly in reaction to Betts, it seems eminently reasonable to wait at least until the current session of the 101st Congress concludes before evaluating the wisdom of going forward. When Congress adjourns in December, this Court can evaluate the status of legislation (e.g., whether it has passed one or both Houses, whether it has been approved — or defeated — by relevant committees, how many sponsors it has picked up, etc.) and determine whether it remains appropriate to wait for Congress to act.

CONCLUSION

For the reasons stated herein, the Commission respectfully requests that this Court stay further proceedings for a reasonable time pending Congressional action.

DATE: September 12, 1989

Respectfully submitted

Charlie Hammel-Smith
Trial Counsel

Jean P. Kamp
Supervisory Attorney

John P. Rowe
Regional Attorney

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Exhibit 1

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July 19, 1989

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Renee L. Bowser
Assistant General Counsel
United Food & Commercial
  Workers International Union,
  AFL-CIO & CLC
1775 K Street N.W.
Washington D.C. 20006

Re: Trafferd E. Anderson, et al., v. Wilson Foods Corporation, and EEOC v. Wilson Foods Corporation Case Nos. 88-4102 and 88-4056 U.S.D.C. C.D. Ill.

Dear Mr. Shanor and Ms. Bowser:

In light of the Supreme Court's June 23, 1989 decision in Public Employees Retirement System of Ohio v. Betts, 57 U.S.L.W. 4931 (No. 88-389), Wilson Foods Corporation requests that you dismiss with prejudice and without costs your lawsuits in the above-captioned matters.

As you know, the Supreme Court in Betts invalidated EEOC's interpretation of the ADEA section 4(f)(2) exemption as it applies to the benefit program challenged in this litigation and ruled that in ADEA "Congress left the employee benefit battle for another day, and legislated only as to hiring and firing, wages and salaries, and other nonfringe-benefit terms and conditions of employment." 57 U.S.L.W. at 4936.

After Betts, a violation of ADEA can be established in the above-captioned lawsuits only if EEOC and the Anderson plaintiffs can prove that the Wilson-UFCW pension and severance pay program challenged in these cases was created for the specific purpose of discriminating against older workers in aspects of the employment relation other than fringe benefits. As counsel for the Anderson plaintiffs is well aware, her employer, the United Food and Commercial Workers International Union, AFL-CIO & CLC and its predecessor unions, has been extensively involved in the collective bargaining negotiations which created and improved upon the pension and severance pay program under attack in this litigation, and there was absolutely no intention on the part of either Wilson or the UFCW to discriminate against older workers in aspects of the employment relation other than fringe benefits by creating and improving upon the pension and severance pay program. Furthermore, EEOC itself originally determined administratively on September 30, 1987, that the discrimination charges on which these lawsuits are predicated did not establish a violation of ADEA under the law as it then existed and decided to adopt the contrary position after engaging in an administrative procedure with respect to which Wilson was denied access and was refused any opportunity to participate and be heard.

We do not believe that continued pursuit of these lawsuits by either the EEOC or the Anderson plaintiffs is warranted by existing law within the meaning of Rule 11. Furthermore, we believe that continued prosecution of these lawsuits for the purpose of enabling EEOC and the Anderson plaintiffs to use discovery procedures to fish for some alternative means to challenge the fringe benefit program at issue here would be improper, especially in view of the original EEOC determination in this matter that the benefit program at issue did not violate ADEA under the law as it existed before Betts.

If dismissal of your lawsuits is not forthcoming, Wilson submits that, at a minimum, it is entitled to a written statement detailing specifically what the EEOC and the Anderson plaintiffs consider to be the good faith argument for the extension, modification or reversal of existing law, in order to ensure that continued pursuit of these lawsuits does not represent harassment, unnecessary delay or needless increase in the cost of litigation on the part of the EEOC or the Anderson plaintiffs within the meaning of Rule 11.

Very truly yours,

Arthur B. Smith, Jr.

ABS:jas

cc: ✓Charlie Hammel-Smith
Irving King

101st CONGRESS
1st Session

S. ____

S. 1511

IN THE SENATE OF THE UNITED STATES

Mr. PRYOR (for himself, Mr. JEFFORDS, Mr. METZENBAUM, (Mr. Kennedy) Mr. BUMPERS, Mr. DECONCINI, ~~[illegible]~~) introduced the following bill; which was read twice and referred to the Committee on ____________

A BILL

To amend the Age Discrimination in Employment Act of 1967 to clarify the protections given to older individuals in regard to employee benefit plans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Older Workers Benefit Protection Act".

SEC. 2. FINDING.

The Congress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System* *of Ohio* v. *Betts*, ________ U.S. ________, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which is to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

SEC. 3. DEFINITION.

Section 11 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 630) is amended by adding at the end thereof the following new subsection:

"(l) The term 'compensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.".

SEC. 4. LAWFUL EMPLOYMENT PRACTICES.

Section 4 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 623) is amended—

(1) by striking subsection (f) and inserting the following new subsection:

"(f) It shall not be unlawful for an employer, employment agency, or labor organization to take any action otherwise prohibited under subsections (a), (b), (c), or (e)—

"(1) where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

"(2)(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this Act, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual; or

"(B) to observe the terms of a bona fide employee benefit plan where, for each benefit or benefit package (as permissible under section 1625.10, title 29, Code of Federal Regulations, as in effect on June 22, 1989), the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual; and

"(3) to discharge or otherwise discipline an individual for good cause.

An employer, employment agency, or labor organization acting under paragraphs (1) or (2) shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this Act.";

(2) by redesignating the second subsection "(i)" as subsection "(j)"; and

(3) by adding at the end thereof the following new subsection:

"(k) A seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan.".

SEC. 5. EFFECTIVE DATE.

(a) IN GENERAL.—This Act shall become effective on the date of enactment.

(b) APPLICABILITY.—This Act shall apply to all actions or proceedings brought under the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.) after June 23, 1989, and actions or proceedings brought under such Act prior to June 23, 1989 which were pending on June 23, 1989.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copies of the foregoing Plaintiff Equal Employment Opportunity Commission's Motion To Stay Proceedings, and Memorandum In Support Of Motion To Stay Proceedings, have this day been served upon the following counsel of record by placing in the U.S. mail, postage prepaid.

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DATE: September 12, 1989

WF 17

MAILED 7/31/87

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,

Plaintiffs,

v.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA TEACHERS ASSOCIATION,

Defendants.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

NO. 84-CV-80C

MEMORANDUM OF LAW FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

INTRODUCTION AND SUMMARY

The issue in this case is whether defendants violated the Age Discrimination in Employment Act (ADEA) by offering an early retirement incentive to employees aged 55 to 60, but not to those over age 60. The Court of Appeals for the Second Circuit last year reversed this Court's entry of summary judgment for defendants and remanded the case for further proceedings. Cipriano v. Board of Education of the City School District of the City of North Tonawanda, 785 F. 2d 51 (2d Cir. 1986).

The court of appeals ruled, in the absence of factual dispute, that defendants' plan violated Section 4(a)(1) of the ADEA,[1] because it withheld an employment-related benefit on the basis of age. 785 F. 2d at 53. On the question of whether the plan was nonetheless protected under Section 4(f)(2) of the ADEA,[2] the court ruled that the plan was "bona fide" and was the type of "employee benefit plan" which the exception shelters. The only issue to be decided by this Court on remand is whether, in addition, the plan "is not a subterfuge to evade the purposes of th[e ADEA]" (Section 4(f)(2), 29 U.S.C. §623 (f)(2)). Relying on established Second Circuit case law, the court of appeals ruled that defendants bear the burden of proof on this issue. 785 F. 2d at 59.

---

[1] Section 4(a)(1), 29 U.S.C. §623(a)(1), provides that:

> It shall be unlawful for an employer--
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age; . . ..

[2] Section 4(f)(2), 29 U.S.C. §623(f)(2), provides in pertinent part that:

> It shall not be unlawful for an employer . . . or labor organization--
> (2) to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . [protected by the Act] because of the age of such individual; . . ..

In remanding the case, the court of appeals directed this Court to "seek the assistance of the EEOC" with respect to the meaning of the term "subterfuge" in Section 4(f)(2), and with respect to "the permissible means of structuring voluntary retirement plans." 785 F.2d at 59. This Court has accordingly requested that the Commission participate in the remand proceedings. In light of that request, and its role as the agency charged with interpretation and enforcement of the ADEA, the Commission has moved to file a memorandum of law as amicus curiae in this case, in order to present its views on the issues now before the Court.[3]

---

[3] The importance of these issues is evident from the growing use of early retirement incentive plans in not only public sector employment (as in this case), but also private sector employment. For example, a recent survey of 50 large industrial companies revealed that 16 companies offered employees early retirement incentives in 1986, compared to only 6 companies in 1985. See "Offering of Early Retirement Incentives on Rise at Top Industrials," in Daily Labor Report (BNA), July 15, 1987, A-12, summarizing The Wyatt Company, "Top 50: A Survey of Retirement, Thrift and Profit-Sharing Plans Covering Salaried Employees of 50 Large U.S. Industrial Companies as of January 1, 1987."

The Wyatt Company survey also revealed that a wide variety of retirement incentives are being offered. Twenty-eight companies provided details concerning retirement incentives which were offered during the 10-year survey period. The most common incentives eased the actuarial pension reduction for early retirement (11 companies), credited additional years of service (11 companies), and added years of age (9 companies). Other incentives included retirement supplements up to age 62, benefits based on final pay, benefits based on a three-year pay projection, removal

[Footnote continued]

First, based upon a review of the ADEA, its legislative history and administrative interpretations, the Commission believes that early retirement incentives do not violate the ADEA.[4] Under established Supreme Court precedent, an incentive plan violates Section 4(a)(1) of the ADEA only where, as here, it deprives older workers of the incentive benefit on the basis of their age. There are various types of incentives--e.g., a lump sum to all retirement-eligible employees irrespective of age, or extensions of pension benefits to younger employees--which do not collide with Section 4(a)(1) at all because they provide equal benefits.

3/ [Footnote continued]

of a service credit cap, and favorable lump sum options (such as the incentive at issue in the instant case).

This memorandum of law will necessarily concentrate on the defendants' particular early retirement incentive plan. However, the Commission will not limit its discussion to that single plan, inasmuch as the principles set forth in this memorandum are applicable to all early retirement incentive plans.

[4] Although Congress has made quite clear that involuntary retirement because of age is unlawful (see Section 4(f)(2), 29 U.S.C. §623(f)(2)), it is equally clear that Congress has not prohibited employees from voluntarily choosing retirement. See Henn v. National Geographic, ___ F.2d ___, 43 FEP Cases 1620 (7th Cir. 1987). See also Paolillo v. Dresser Industries, ___ F.2d ___, 44 FEP Cases 71 (2d Cir. 1987) (by implication). Instead, a primary goal of the ADEA is "to create a climate of free choice between continuing in employment as long as one wishes and is able, or retiring on adequate income with opportunities for meaningful activities." 118 Cong. Rec. 7745 (1972) (remarks of Sen. Bentsen in introducing an amendment to extend the protection of the ADEA to government employees, quoting a Report of the White House Council on Aging).

Second, the Commission believes that Section 4(f)(2) of the ADEA protects an early retirement incentive plan even if it provides unequal benefits to older workers, where participation in the plan is voluntary for all retirement-eligible employees and where there is a legitimate business reason for structuring the plan with specific age limitations. The Commission believes that, unlike other types of employee benefit plans, an employer is not required to incur equal costs on behalf of all older workers under such a voluntary plan. In the Commission's view, an employer--and here the union--may prove that the plan "is not a subterfuge to evade the purposes of th[e ADEA]" by demonstrating that the age limitations are justified by an objective assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives.

The defendants have not yet offered any evidence on this "subterfuge" issue. Accordingly, this Court should afford defendants an opportunity to prove that a cost/benefit analysis or some other legitimate business reason justifies structuring their voluntary early retirement incentive plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60.

BACKGROUND

Facts

Two retired teachers brought this ADEA action against their former employer, the Board of Education of the City

School District of the City of North Tonawanda, New York (the School Board), and their union, the North Tonawanda Teachers Association (the Union). Plaintiffs alleged that, because of their age, they were discriminatorily denied an employment-related benefit which was given to younger workers. Specifically, plaintiffs challenged a provision of the 1980 collective bargaining agreement which offered a choice of two benefits to teachers age 55 to 60 who had completed 20 years of service and who agreed to retire between July 1 and February 1, in any of the three years (1980-83) covered by the agreement: (A) paid-up medical insurance premiums to age 65, plus $2000, plus $50 for each year of service beyond 20 years, or (B) a lump sum of $10,000. Plaintiffs were 61 years old on July 1, 1980, and were thus ineligible for this early retirement incentive plan (the plan) by its terms. They retired the following year, on June 30, 1981, and later filed this suit to recover the $10,000 they would have received under Option B if the plan had applied to them at the time of their retirement.

Although not in evidence below, we understand--and it is undisputed--that the incentive was first offered to all pension-eligible teachers, regardless of age, in a previous collective bargaining agreement effective January 1979 to June 1980. However, teachers over age 60 had nine months (to September 30, 1979) within which to elect early retirement, while younger teachers had eighteen months (to June 30, 1980) to exercise the option. In any event, plaintiffs, who were 60 years old at the time, chose not to participate in this first incentive program. We also understand--and it is also undisputed--that the second plan established in 1980 remains in effect.

This Court entered summary judgment for defendants, holding that the Section 4(f)(2) exception applied. It concluded that the plan was "bona fide" and found "nothing in this record to indicate that the plan is a subterfuge to evade the purposes of the act." Finally, citing to Mason v. Lister, 562 F.2d 343 (5th Cir. 1977), and Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), this Court concluded that the plan was consistent with what Congress "meant to" do in enacting the statute, viz., to prevent the forced discharge of older individuals while preserving early retirement incentives as "useful and necessary devices which employers can use to manage their work forces."

Court of Appeals Opinion

In the absence of any dispute, the court of appeals initially ruled that the incentive plan violated the Section 4(a)(1) prohibition against age-based discrimination in "compensation, terms, conditions or privileges of employment." 785 F.2d at 53-4. It then considered whether the Section 4(f)(2) exception applied.

First, it concluded that the incentive plan was a "bona fide employment benefit plan" within the meaning of Section covered by it and should be "read as a supplement to [the] underlying general retirement plan for the purposes of §4(f)(2)." 785 F.2d at 54. The court reasoned that, because the special incentive simply increased retirement compensation and, "like benefits available under the underlying retirement plan, is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of that plan." 785 F.2d at 56. The court pointed to Patterson v. Independent School District #709, 742 F.2d 465, as support for its holding, noting that Patterson had upheld an early retirement incentive under Section 4(f)(2) on the ground that it merely encouraged employees to activate the general pension plan, which was admittedly lawful, at an earlier age. 785 F.2d at 55.

In holding that the incentive plan was "a bona fide employee benefit plan," the court rejected plaintiffs' argument that Section 4(f)(2) applies only to plans in which the age-based reduction of benefits is justified by actuarially significant cost factors. The court read the applicable administrative interpretation, 29 C.F.R. §860.120(a)(1) [recently redesignated as 29 C.F.R. §1625.10(a)(1)], to include within Section 4(f)(2) plans that reduce benefits on the basis of age due to "significant cost considerations," whether or not those considerations are actuarially based. 785 F.2d at 54. The court stated that "significant cost considerations" are involved in designing early retirement incentives, because the goal of these plans is to save salary expenses; since the departure of younger workers saves more years of salary, the court observed, "it is only reasonable for the employer to offer more" to them than to older workers who remained on salary longer. 785 F.2d at 55. Finally, in the court's view, the structure of the plan--e.g., whether it offered a lump sum benefit before age 60 or one that tapered off by 60--goes to whether it is a subterfuge and not to "whether it qualifies generically for the shelter of §4(f)(2)." 785 F.2d 55.

The court then turned to the question of whether the plan was "a subterfuge to evade the purposes" of the Act. Noting that Second Circuit case law assigns defendants the burden of proof on this issue, it held that these defendants had not sufficiently discharged that burden to justify dismissal without trial. However, the court was uncertain as to the nature of the proof Section 4(f)(2) requires in this context.

It pointed out that the "subterfuge" proviso had been litigated mainly in cases involving mandatory retirement. 785 F.2d at 58. Accordingly, the court thought it "rather hard to give content to the concept of 'subterfuge' when that term is applied to a plan for voluntary action . . . and the complaint is made, not by employees who claim that they were tricked . . . into prematurely leaving the workforce, but rather by employees who protest at having been excluded from the option." 785 F.2d at 58. Nonetheless, it recognized that Congress (in its 1978 ADEA amendments banning involuntary retirement because of age) had left the "subterfuge" language in the statute, thereby requiring employers to show something more than that challenged benefit plans are bona fide. For this reason, and in light of the Department of Labor's Section 4(f)(2) interpretation (29 C.F.R. §860.120(a)(1), now 29 C.F.R. §1625.10(a)(1)) requiring employers to justify age-based benefit distinctions on the basis of age-related cost considerations, the court held at minimum that the defendants "must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as [they] did." 785 F.2d at 58.

The court suggested, however, that the "evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan." 785 F.2d 59. It remanded the case to allow this Court, with the Commission's assistance as _amicus_ _curiae_ or intervenor, to consider in the first instance the nature of proof which will discharge defendants' burden of proving the absence of "subterfuge" in cases such as this.

I. Application of Section 4(a)(1) to Early Retirement Incentives

1. As noted above at page 2, the court of appeals ruled that defendants' early retirement incentive plan violated the Section 4(a)(1) prohibition against discrimination on the basis of age "with respect to an individual's compensation, terms, conditions or privileges of employment." That conclusion is firmly supported by Supreme Court precedent establishing that employers run afoul of Section 4(a)(1) if they subject older workers to treatment which, "but for" the employees' age, would be different. Trans World Airlines v. Thurston and EEOC, 469 U.S. 111, 120 (1985). Accord Geller v. Markham, 635 F.2d 1027, 1035 (2nd Cir. 1980), cert. denied, 451 U.S. 945 (1981). Cf. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) (Section 703(a)(1) in Title VII of the Civil Rights Act of 1964 violated where female employee provided different periodic retirement benefits "because of sex"); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983)(same).

The Commission argued in Thurston that, while the ADEA does not compel an employer to provide any particular benefits, the benefits that it chooses to provide cannot be withheld from older employees because of age. The Supreme Court agreed. Thurston, 469 U.S. at 121, citing Hishon v. King & Spalding, 467 U.S. 69, 75 (1984)("benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all"). This is true whether or not participation in the plan is voluntary, because the Supreme Court has held that "the opportunity to participate in [an employee benefit] plan constitutes a 'condition[] or privilege[] of employment,' and that retirement benefits constitute a form of 'compensation.'" Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983)(emphasis added; citations and footnotes omitted).5/ Section 4(a)(1), like Section 703(a)(1) of Title VII,6/ "forbids all discrimination concerning 'compensation, terms, conditions, or privileges of employment,' not just discrimination concerning those aspects of the employment relationship as to which the employee has no choice." Id. at 1081-82, n.10.

Thus, the first question in incentive cases is whether the challenged plan offers unequal benefits to employees on account of their ages. Incentive plans which make age-based distinctions in the amount of benefits violate Section 4(a)(1).

5/ The voluntariness of participation in a plan is pertinent to any claim that employees have, in fact, illegally been coerced into retirement. See Henn v. National Geographic Society, ___ F.2d ___, 43 FEP Cases 1620 (7th Cir. 1987); Paolillo v. Dresser Industries, ___ F.2d ___, 44 FEP Cases 71 (2d Cir. 1987). Voluntariness may also be a defense if the issue is whether the incentive is a pretext to get rid of older workers who are eligible for it.

6/ Section 4(a)(1) was derived in haec verba from Section 703(a)(1). Lorillard v. Pons, 434 U.S. 575, 577 (1978).

2. The North Tonawanda defendants conceded that their plan provides unequal benefits in violation of Section 4(a)(1) of the ADEA.[7] The plan provides for a substantial financial benefit ($10,000, or cash plus health insurance premiums) to employees age 55 to 60 who are otherwise eligible for early retirement and who volunteer to leave the work force. Employees over the age of 60 are deprived of that benefit. Thus, employees over age 60 are treated differently from similarly-situated younger employees because of their age; and, the plan on its face violates Section 4(a)(1) because, "but for" their age, retirement-eligible employees over age 60 would be entitled to the incentive when they retired.

3. Although North Tonawanda's plan violates Section 4(a)(1), incentive plans can be, and often are, structured so that they do not. The court's request for suggestions as to lawful means of structuring incentives can probably best be answered by providing a few examples of such plans already in use which provide equal benefits. The ensuing discussion,

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[7] In the court of appeals, they did assert that it somehow makes a difference that all employees, including plaintiffs, had a right to take the incentive if they retired by June 30, 1980. See supra at 6. Although the terms of this "window" provision were not in the record before the Second Circuit, the court stated that any such "window" was immaterial to defendants' Section 4(a)(1) liability, because "[plaintiffs'] claim [was] not that they were denied the opportunity ever to participate in the incentive plan, but that they were denied the opportunity on the date they ultimately chose to retire." 785 F.2d at 52, n.2 (dictum). However, as explained infra at 29-31, provision of a "window" may be crucial to establishing that the plan is not a "subterfuge" under Section 4(f)(2).

while not intended to be an exhaustive recitation of specific plans, provides some broad prototypes which do not violate Section 4(a)(1). That provision does not render retirement incentives generally unlawful; nor does it unreasonably restrict employer options.

First, the employer could simply offer a flat incentive --a lump sum or cash times years of service and/or paid up insurance premiums--to all retirement-eligible employees regardless of age and under the same conditions. For example, an employer might offer incentives identical to those offered by the defendants in this case, but without any maximum age limitation on participation. The Wyatt Company survey, discussed supra n.3 at 3-4, reveals that two major industrial companies offered precisely such incentive plans in 1986.

The most widely offered early retirement incentive (11 surveyed companies in 1986) involves lowering the age at which actuarially unreduced benefits are available under a pension plan. A common formula for determining benefits is [final average salary] x [a fraction of salary (usually at least 1.5%)] x [years of service] x [1 (at normal retirement age; typically 65)]. Under such plans employees can usually retire a few years before normal retirement age but the final factor of [1] will be reduced for each year short of normal retirement age, so that if one retires at age 55, the formula will be something like: [final salary] x [a percentage (1.5%)] x [years of service] x [.363]. To encourage early retirement, employers may offer to eliminate the actuarial reduction for all those otherwise eligible for early retirement. In this way, the employer is not providing unequal benefits on the basis of age. Rather, each retirement eligible employee's pension will be calculated on the basis of salary and years of service. Thus, a 65-year-old employee with a $40,000 final annual salary and 20 years of service will receive the same periodic pension benefit as a 55-year-old with the same pay and years of service.

It may be argued that removing the actuarial reduction for the younger worker leads to unequal benefits, because the actuarial value of the benefit will be greater for younger employees as a group than for the older employees as a group. The focus of Section 4(a)(1), however, like its Title VII counterpart (Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1)), is on the individual, not on the group. Arizona Governing Committee v. Norris, 463 U.S. at 1073 (1983); Connecticut v. Teal, 457 U.S. 440, 453-54 (1982); City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. at 708 (1979). Hence, actuarial predictions of value--even though they may be accurate for the group--are not pertinent to whether Section 4(a)(1) is violated. Manhart, 432 U.S. at 710, n.20 (impact on group irrelevant, retiree's total pension benefit depends on his or her actual life span; emphasis in original). Rather, the question is whether each employee receives equal ascertainable benefits irrespective of age.[8]

If all the eligible employees receive equal monthly benefits for life, they are not being treated differently because of age.[9] See id. at 711-12. Cf., Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1427 (7th Cir. 1986) (employer did not violate Section 4(a)(1) where its early retirement plan gave equal monthly benefits to every employee whose age and years of service totalled 75, even though the total benefit was larger for younger than older employees because younger employees were expected to draw the benefit for a longer period of time). In short, where the incentive merely amends the underlying benefit plan so that all retirees receive an equal periodic benefit for life, it does not violate Section 4(a)(1).[10]

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[8] For this reason, we believe that it would be incorrect to argue that Section 4(a)(1) is not violated because the incentive is a salary replacement (see Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985)), which should be greater for younger workers who are potentially foregoing greater future earnings. The future work pattern of any individual is entirely speculative. Manhart and Norris make it clear that projections about the probable life or working life of the group cannot justify unequal benefits under Section 4(a)(1). Britt itself does not purport to support any such argument. It held only that the employer did not violate Section 4(a)(1) when it declined to allow employees to draw the incentive and retirement benefits simultaneously.

[9] By "equal benefits," we mean an equal fraction of salary times years of service. The same analysis would apply to incentive plans for which the underlying retirement plan prescribes a fixed monthly amount for all employees of a given age and length of service. If the employer simply lowers the age at which the benefit is available, Section 4(a)(1) is not violated.

A third incentive used by employers gives extra age and service credits--frequently five years--to each employee.[11] Because virtually all plans have a minimum age and service requirement for pension eligibility, this increases the number of employees eligible for retirement. It also makes some employees eligible for actuarially unreduced benefits;

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[10] It might be argued that incentives by definition give something extra to younger workers that the older employees have already earned--here, for example, a vested interest in a pension benefit of a certain amount. We disagree. Employers can always extend a benefit to larger groups of employees without having discriminated against those who already have the benefit. For example, if an employer offered college tuition to all management trainees with eight years of service and later extended the benefit to all management trainees, we do not think there is a serious argument that the value of the benefit to the trainees who already have eight years service has been diminished.

Furthermore, such an argument seems to assume that pension benefits are purely a reward for service. They are not. They are also viewed as a deferred wage or an income stream to provide for loss of income upon retirement. E. Allen, Jr., J. Melone, and J. Rosenbloom, "Pension Planning" 2-7, 33 (5th ed. 1984). Pensions are not solely a reward for service: one cannot draw on them at all until a certain age; some minimum amount can be drawn after a miniscule service period; there is a significant actuarial reduction for those who retire before the "normal retirement age" and they are often payable at least until death whether one lives 10 or 40 years after retirement.

In short, pension benefits, in their role as income replacement, make it possible for eligible employees to choose retirement. We do not think that an older employee is deprived of a benefit when an employer simply makes it possible for more employees to choose retirement.

[11] The Wyatt Company survey, discussed _supra_ n.3 at 3-4, indicates that such age and/or service add-ons are among the most frequently offered early retirement incentives.

for example, if normal retirement age is 65, a 60-year-old receives actuarially unreduced benefits. Finally, in the typical defined benefit plan, described above, in which years of service are part of the calculation of benefit amount, this incentive increases the periodic benefit of every employee. If every employee is given the add-on, there is no disparate treatment on the basis of age. Some employees will become eligible for early or full benefits who were not previously eligible. Such an expansion of the group eligible for retirement does not deprive the older worker of a benefit, and is lawful under Section 4(a)(1).[12]

In sum, many early retirement incentive plans already in use by major companies do not violate Section 4(a)(1) of the ADEA.

II. Application Of The Section 4(f)(2) Exemption To Early Retirement Incentives

Exceptions to the Section 4(a)(1) prohibitions against discrimination are to be narrowly construed.[13] To establish the Section 4(f)(2) defense the employer must show: 1) there is a bona fide employee benefit plan; 2) the action was taken in observance of its terms; and, 3) the plan is not a subterfuge to evade the purposes of the ADEA. United Airlines v. McMann, 434 U.S. 192, 198 (1977).

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[12] Some employers limit add-ons by, for example, limiting total service credits. This brief cannot analyze the many variations which exist.

[13] *Orzel* v. *City of Wauwatosa Fire Dept.*, 697 F.2d 743, 748 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983); *Smallwood* v. *United Airlines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 469 U.S. 832 (1982); *Houghton* v. *McDonnell Douglas Corp.*, 553 F.2d 561 (8th Cir.), *cert. denied*, 434 U.S. 766 (1977).

The court of appeals in this case ruled that the School Board and Union were "observing the terms" of their incentive plan. We agree, and believe that this will seldom be a disputed issue in litigation attacking retirement incentives.

The court of appeals also ruled that the incentive plan was a "bona fide employee benefit plan" within the meaning of Section 4(f)(2) because it paid substantial benefits, was "functionally related" to the underlying retirement plan, and involved significant cost considerations. See supra at 7-8.[14]

Finally, the court ruled that the School Board and the union must nonetheless prove that their actions were not a "subterfuge" by showing "a legitimate business reason for structuring the plan as [they] did." See supra at 9-10. It added that this court should seek the Commission's guidance concerning the meaning of "subterfuge" as applied to the ADEA as amended in 1978.

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[14] An argument might be made that this kind of lump sum plan is not the kind of plan Congress intended to cover under Section 4(f)(2), but is more analogous to the kinds of benefits held to be outside that section's purview in EEOC v. Bordens, 724 F.2d 1390 (9th Cir. 1984), EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. den., 105 S.Ct. 92 (1984), and Alford v. City of Lubbock, 664 F.2d 1272 (5th Cir.), cert. den., 456 U.S. 975 (1982). However, that issue has been resolved here by the Second Circuit's ruling.

A. "Subterfuge" In General

Even if an early retirement plan qualifies generically for the shelter of Section 4(f)(2), the employer must prove that the plan as structured is not a "subterfuge to evade the purposes of th[e ADEA]." A "subterfuge" is a "scheme, plan, stratagem or artifice of evasion." Potenze v. New York Shipping Ass'n, 864 F.2d 235, 238 (2d Cir. 1986), citing United Airlines v. McMann, 434 U.S. 192, 203 (1977). The Second Circuit has ruled that the employer bears the burden of proving lack of intent to evade the purposes of the ADEA. EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). Accord, EEOC v. Eastern Airlines, ___ F.2d ___, 27 FEP Cases 1686, 1689 (5th Cir. 1980).

The ADEA's purposes are to prevent arbitrary age discrimination and to promote the employment of older workers. See Section 2(b), 29 U.S.C. §621(b). Where the employer has set up or amended a benefit plan after passage of the ADEA to the disadvantage of older employees, it must prove that its action was prompted by legitimate, nondiscriminatory business reasons. EEOC v. Home Insurance Co., 672 F.2d at 260 n.11; EEOC v. Baltimore & Ohio Railway Co., 632 F.2d 1113 (4th Cir. 1981); EEOC v. Eastern Airlines, 27 FEP Cases at 1689; Smart v. Porter Paint Co., 630 F.2d 490, 495 (7th Cir. 1980). Both the administrative interpretations and congressional intent concerning Section 4(f)(2) indicate that, with very limited exceptions, there is only one legitimate reason for providing smaller benefits to older workers: the cost of providing the benefit increases because of age. See EEOC v. Borden's, Inc., 724 F.2d 1390, 1396 (9th Cir. 1984); EEOC v. Westinghouse Electric Corp., 725 F.2d 211, 224-25 (3d Cir. 1983).

The 1967 Congress which enacted the ADEA recognized that the cost of providing certain employment benefits increases with age. Senator Javits proposed the amendment which became Section 4(f)(2) in order to provide employers with the "flexibility" to make necessary distinctions based on age so as to ensure that employers would not be discouraged from hiring older workers because of the increased costs associated with providing benefits to them. Hearings on S. 830 before the Subcomm. on Labor of the Senate Comm. on Labor & Pub. Welfare, 90th Cong., 1st Sess., 27 (1967); See also EEOC v. Borden's, Inc., 724 F.2d at 1396. Senator Javits explained:

> The amendment relating to . . . employee benefit plans is particularly significant. Because of it an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers. At the same time it should be clear that this amendment only relates to the observance of bona fide plans. No such plan will help an employer if it is adopted merely as a subterfuge for discriminating against older workers.

113 Cong. Rec. 31254-55 (1967)(emphasis added). The floor

manager of the bill, Senator Yarborough, elaborated on the Section 4(f)(2) exemption, saying that older workers would not be denied employment but their rights to "full consideration" in pension plans would be limited. 113 Cong. Rec. 31255 (1979).[15]

In 1969, the Department of Labor, which was then charged with administering the ADEA, published an interpretation specifically stating that Section 4(f)(2) applied to employee benefit plans which involved age-related cost considerations. See 29 C.F.R. §860.120, 34 Fed. Reg. 9709 (June 21, 1969), which provided in pertinent part:

> . . . A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage. . . .

In considering amendments to the ADEA in 1978, Senator Javits explicitly approved that interpretation, saying:

> The purpose of Section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus, a

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[15] The views of Senators Javits and Yarborough, as sponsors of the legislation, are entitled to substantial weight in interpreting the statute. FEA v. Alonquin SNG, Inc., 426 U.S. 548, 564 (1976).

> *retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage*.

124 Cong. Rec. 8212 (emphasis added). *See also* remarks of Rep. Hawkins, 124 Cong. Rec. 7881 ("the purpose of section 4(f)(2) is to encourage employment of older workers by permitting age based variations in benefits where the cost of providing benefits to older workers is substantially higher").

After thus indicating agreement with the Labor Department interpretation of Section 4(f)(2), Congress left the section unchanged except for an amendment providing that the exemption did not permit involuntary retirement. It also asked the Secretary of Labor to issue more comprehensive guidelines.[16]

Accordingly, in 1979, the Labor Department issued an amended Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. §860.120 (44 Fed. Reg. 30648), which was recently redesignated as 29 C.F.R. §1625.10.[17] Those interpretive regulations elaborated upon the age-related cost principle previously enunicated by the Department and endorsed by Congress. 29 C.F.R. §860.120(a)(1); now, 29 C.F.R. §1625.10 (a)(1). The regulations specify that a plan which prescribes lower benefits for older employees is "not a subterfuge within the meaning of section 4(f)(2), provided that the lower level benefits is justified by age-related cost considerations." 29 C.F.R. §860.120(d); now, 29 C.F.R. §1625.10 (d). The Bulletin permitted a few exceptions to the "equal cost" principle which, inter alia, allowed employers to include medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. §860.120(f)(ii)(A) and (f)(iv)(A); now, 29 C.F.R. §1625.10(f)(ii)(A) and (f)(iv)(A).

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[16] *See* remarks of Senator Javits, 124 Cong. Rec. 8219 (1978) ("The Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefits plans, and the Seccretary is urged to act as soon as possible.").

[17] The Labor Department regulations were continued in effect after ADEA enforcement authority was transferred to the Commission. *See* 44 Fed. Reg. 37974 (1979). Those regulations were *recently* redesignated and republished by the Commission as 29 C.F.R. §1625.10, 52 Fed. Reg. 23811 (June 25, 1987).

Congress has twice amended the ADEA since publication of the 1979 Interpretative Bulletin ("IB"). In 1982, Congress amended the ADEA to disallow the medicare exception. Section 4(g) of the ADEA, Pub. L. 97-248, §116. See also S. Rep. 97-494, 97th Cong., 2d. Sess. 10, reprinted in 1982 U.S. Code Cong. & Admin. News 792-93. Last year, Congress amended the statute to require pension benefit accruals beyond normal retirement age. Section 4(i) of the ADEA, Pub. L. 99-509, §9201; H. Conf. Rep. No. 99-1012, 99th Cong. 2d Sess. 374, 378, reprinted in, Dec. 1986, U.S. Code Cong. & Admin. News 4019, 4023.

The significance of these Congressional actions is that

Section 4(f)(2) was left intact, together with the interpretive regulations on "equal cost," after Congress indicated that it was familiar with the specific provisions of the Labor Department's IB. Indeed, Congress acted to abolish some of the exceptions to the "equal cost" requirement contained in the IB. Under established principles of statutory construction, such activity supports the conclusion that Congress has reviewed and approved the position that Section 4(f)(2) generally allows employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age.[18]

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[18] See e.g.: Andrus v. Allard 444 U.S. 51, 57 (1979) ("particularly relevant" that Congress has twice reviewed and amended the statute without rejecting the enforcing agency's view); U.S. v. Rutherford, 442 U.S. 544, 553-54 and n.10 (1979) ("once an agency's statutory construction has been fully brought to the attention . . . of Congress and [it] has not sought to alter the interpretation although it amended the statute in other respects, then presumably the legislative intent has been fully discerned"); U.S. v. Correll, 389 U.S. 299, 305-06 (1967)("longstanding federal regulations and interpretations applying to unamended or reenacted statutes are deemed to have received Congressional approval and have the effect of law"); U.S. v. Cerecedo Hermanos y Compania, 209 U.S. 337, 339 (1908) (where meaning of statute in doubt great weight given to construction by department charged with execution of the statute, and reenactment by Congress, without change, of a statute which has received long continued executive construction, is an adoption by Congress of such construction). See also EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981) (Congress' silence during the many years a Commission regulation was extant suggests its consent to the Commission's practice).

B. "Subterfuge" in the Context of Early Retirement Incentives

The IB provides extensive and detailed guidelines on the application of the "equal cost" principle to life, health and disability insurance plans. The IB also provides equally extensive and detailed "special rules" for retirement and pension plans, which are "not tied to actuarially significant cost considerations" (44 Fed. Reg. 30656).[19] However, the IB does not even mention early retirement incentive plans, let alone address the issue of whether the "equal cost" principle or some other "special rules" should be applied to such plans.[20]

The absence of any mention of early retirement incentives is understandable. The Supreme Court originally construed Section 4(f)(2) of the ADEA to permit involuntary retirements because of age. United Airlines, Inc. v. McMann, 434 U.S.

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[19] Some of the "special rules" for retirement and pension plans have been rescinded by the Commission (52 Fed. Reg. 8448 (March 18, 1987), withdrawing 29 C.F.R. §860.120(f)(1)(iv)(B)), pursuant to a district court order which has since been partially vacated in other respects. See American Ass'n of Retired Persons v. EEOC, ___ F. 2d ___, 44 FEP Cases 357 (D.C. Cir. 1987).

[20] The subject of early retirement incentives was not discussed in the extensive preambles to the IB, either as initially proposed or as promulgated in final. 43 Fed. Reg. 43264-68 (1978); 44 Fed. Reg. 30648-657 (1979). Likewise, the subject was not mentioned during administrative hearings or in written comments on the proposed IB. See Official Report of Proceedings before the Office of Administrative Law Judges of the U.S. Dep't of Labor, In the matter of Age Discrimination in Employment Act of 1967 (1978), transcript of hearings (2 vols.) and written comments (4 vols.).

192 (1977). Thus, there was no need for employers to offer special incentives to induce employees voluntarily to elect early retirement. Early retirement incentive plans, therefore, did not exist in substantial numbers and did not in any event result in challenges under the ADEA.

In 1978, Congress "overruled" the McMann decision by passing an amendment to Section 4(f)(2), which provides in part that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . [protected by the ADEA] because of the age of such individual." 29 U.S.C. §623(f)(2), as amended by Pub. L. 95-256, §2(a). It was that amendment which eventually gave rise to early retirement incentive plans as a means by which employers could continue to retire older workers, by voluntary election rather than by coercion. Yet, those plans did not appear on the employment relations scene until well after the IB was issued in 1979. See "Voluntary early retirement plans urged to reduce workforce without risking ADEA lawsuits," in Daily Labor Report (BNA), Oct. 25, 1982, A-6.

Although the IB does not address the subject of early retirement incentive plans, the IB may of course be used for guidance where appropriate. For example, if the cost of providing benefits under such a plan increases with age, an employer may rely on the "equal cost" principle to justify the payment of lesser benefits to older workers. Indeed, any early retirement incentive plan which is structured in good faith, in conformity with, and in reliance on the IB is sheltered from liability under the ADEA.[21]

On the other hand, because the IB does not address the subject of early retirement incentive plans, the Commission does not believe that the "equal cost" principle should be automatically imposed as the exclusive test for proving the absence of "subterfuge" in such plans. As discussed above at 24, the IB itself permits exceptions to the "equal cost" principle. In the Commission's view, a similar exception is warranted in the case of truly voluntary early retirement incentive plans.

The factor which distinguishes early retirement incentive plans from other employee benefit plans, and which warrants an exception to the "equal cost" method for disproving "subterfuge," is the voluntary nature of employee participation in such plans.[22] By definition, early retirement incentive plans do not compel employees to retire. Instead, the plans provide monetary incentives intended to encourage employees voluntarily to elect early retirement. Employees are free to reject the retirement incentives and to continue their employment without suffering any penalty.

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[21] Section 7(e)(1) of the ADEA, 29 U.S.C. §626(e)(1), incorporates by reference Section 10 of the Portal-to-Portal Act, 29 U.S.C. §259, which provides in part that "no employer shall be subject to any liability . . ., if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on" a regulation or interpretation of the appropriate government agency, here the Department of Labor and the Commission. See EEOC v. Home Insurance Co., 672 F.2d 252, 263 (2d Cir. 1982):

> The Portal Act was designed to protect employers from liability if they took certain actions on the basis of an interpretation of the law by a government agency, even if the agency's interpretation later turned out to be wrong . . . . [T]he Portal Act defense requires the employer to establish three interrelated elements: (1) that its action was taken in reliance on a ruling [by the appropriate government agency], (2) that it was in conformity with that ruling, and (3) that it was in good faith.

Of course, a retirement incentive plan is voluntary only as to those employees who are afforded an opportunity to participate in the plan. A plan which excludes employees above a specific age (e.g., age 60) is hardly voluntary as to the excluded employees. Therefore, to be truly voluntary, a plan must be available to all employees eligible for retirement. In this regard, the Commission believes that the availability of a "window" of participation for all retirement eligible employees may be crucial.[23] The defendants in this

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[22] Consideration of the element of voluntariness is not relevant in determining whether a retirement incentive plan violates Section 4(a)(1) of the ADEA. See discussion supra at 12. However, the Commission believes that it is relevant in determining whether the plan is protected by virtue of Section 4(f)(2), or is merely a "subterfuge to evade the purposes of th[e ADEA]."

[23] As noted supra at 13, n.7, the court of appeals expressed the view--with which the Commission agrees--that the existence of a "window" is immaterial in determining whether defendants' plan violates Section 4(a)(1) of the ADEA. 785 F.2d at 52, n.2 (dictum). However, the Commission believes that a "window"

[Footnote continued]

caso apparently provided, and continue to provide, the kind of "window" which assures all retirement eligible employees a reasonable opportunity to participate in the early retirement incentive plan.

When the defendants' plan was first instituted in 1979, even teachers who were over the age 60 limit on participation were given an opportunity to elect retirement under the incentive plan. Admittedly, they were afforded a shorter period in which to elect retirement than younger teachers: nine months vs. eighteen months. See supra at 6. This disparate treatment of older teachers was a prima facie violation of Section 4(a)(1) of the ADEA. However, under Section 4(f)(2), it is a question of fact whether the election period for teachers over age 60 was so unreasonably short as to preclude an informed choice and thus to convert the plan into an unlawful "subterfuge to evade the purposes of th[e ADEA]." See Paolillo v. Dresser Industries, ___ F.2d ___, 44 FEP Cases 71 (2d Cir. 1987).

Moreover, defendants' on-going plan currently affords all teachers age 55 and older the same five-year period in

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23/ [Footnote continued]

is relevant in determining whether the plan is protected by virtue of Section 4(f)(2), or is merely a "subterfuge to evade the purpose of th[e ADEA]." We do not believe that the court of appeals addressed this Section 4(f)(2) issue; but, to the extent that the court's dictum may be so read, the Commission would disagree with those observations.

which to elect early retirement under the incentive plan. Teachers who choose not to retire during that period thus voluntarily elect to forego the early retirement incentives and, instead, potentially earn far more in salary and added pension credits. As to those teachers, the plan's age-60 cutoff of the option to participate does not appear to be arbitrary discrimination. Rather, it is a natural consequence of the human aging process, which eventually carries all teachers through the wide window of eligibility for early retirement incentives.[24]

The Commission believes that, as the court of appeals suggested (see 785 F.2d at 59), the evidence of business reasons required to show that such a voluntary early retirement incentive plan is not a "subterfuge" would necessarily be less than that required by the "equal cost" principle for other types of employee benefit plans. This does not mean, however, that the employer's burden of proof is a light one.[25] As the court of appeals held, "the employer--and also here the union--must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did." Id. at 58. Because of the focus of the term "subterfuge" on intent, an employer must demonstrate a legitimate business reason not merely for having an early retirement incentive plan, but for having its particular plan. Thus, the employer must justify the decision to impose the specific age limitations in its plan. See Potenze v. New York Shipping Association, 804 F.2d 235, 238 (2d Cir. 1986): "The plan need not be the best available plan [i.e., the least age-discriminatory method of accomplishing the employer's legitimate business objective], though obviously if it is not, the proferred reasons for the structure of the plan will have less force."

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[24] The courts have recognized that "[t]he progression of age is a universal human process," which thus tends to distinguish age discrimination cases from "cases involving the immutable characteristics of race, sex and national origin." Laugesen v. Anaconda Co., 510 F.2d 307, 313, n.4 (6th Cir. 1975). Accord, e.g.: Holley v. Sanyo Mfg., Inc., 771 F.2d 1161, 1166 (8th Cir. 1985); Dorsch v. L.B. Foster Co., 782 F.2d 1421, 1428 (7th Cir. 1986); Dabrowski v. Warner-Lambert Co., 815 F.2d 1076, 1079 (6th Cir. 1987). Congress recognized this distinction in ADEA cases by enacting the Section 4(f)(2) exception for employee benefit plans, which has no counterpart in the provisions of Title VII of the Civil Rights Act of 1964 prohibiting (among other things) employment discrimination based on race, sex, and national origin.

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[25] The Commission disagrees with Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984), where the court held, essentially, that a voluntary early retirement incentive plan is immune from scrutiny. The court did not analyze the meaning of "subterfuge" but, instead, reasoned that since the Supreme Court in United Airlines v. McMann, 434 U.S. 192 (1977), had upheld an involuntary early retirement plan, "a voluntary plan is a fortiori permissible." The Patterson court failed to recognize that the McMann plan was upheld on the ground that it was established before the ADEA was enacted and, thus, could not have been a "subterfuge to evade the purposes of th[e ADEA]." The Patterson plan was instituted after passage of the ADEA. Moreover, McMann was overruled by the 1978 amendments in which Congress made clear that involuntary retirements because of age were unlawful. The Patterson court neither mentioned nor addressed the effect of the amendments.

In the Commission's view, this burden to demonstrate the absence of "subterfuge" will be most effectively met where the specific age limitations are based on and reasonably supported by some objectively measured assessment of increasing cost and/or declining benefit to the employer in providing the retirement incentives. For example, a cost/benefit analysis might consider such factors as the anticipated working life of employees relative to "normal" or expected retirement age, and cost of the retirement inducement versus payroll savings to be potentially realized by the employer.[26] Even assuming that an employer provides such a cost/benefit analysis, an aggrieved older worker would still have an opportunity to rebut the proferred justification by a showing of pretext. The rebuttal might, for example, take the form of direct proof of the employer's age discriminatory intent or a showing that the cost/benefit analysis does not support the specific age limitations. In any event, because the Section 4(f)(2) exception is an affirmative defense, it would remain the employer's ultimate burden to prove that the age limitations are justified by a legitimate business reason.

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[26] This type of age-related cost/benefit analysis is often applied, even if only on an informal basis, in establishing "sliding scale" early retirement incentive plans. Such a plan is, typically, one in which the incentive is reduced by steps as the employee advances in age. See e.g., Patterson v. Independent School District #709, 742 F.2d 465 (8th Cir. 1984). The incentive may be greatest at the age when an employee is first eligible for early retirement, and may be entirely eliminated when the employee attains the "normal retirement age" specified in the regular pension plan (usually age 65). This may reflect the employer's assessment that larger incentives are required to induce the voluntary retirement of younger workers, and that it is not cost effective to offer any inducement to a 65-year-old worker who may already be qualified for a full pension (i.e., no reduction for early retirement). Where the assessment has adequate factual support and is based on reasonable assumptions about working life expectancy, it may be sufficient to demonstrate that the specific age limitations in the plan are justified by a legitimate business reason.

CONCLUSION

The court of appeals recognized that the defendants have not yet offered any proof on the issue of "subterfuge." Accordingly, applying the standards discussed above, this Court should afford defendants an opportunity to prove: (1) that their early retirement incentive plan provided a truly voluntary option for all retirement eligible employees to participate; and, (2) that there is a legitimate business reason for structuring the plan to provide a $10,000 benefit to teachers age 55-60, but nothing to those over age 60.

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CERTIFICATE OF SERVICE

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,)
)
Plaintiffs,)
)
v.)
)
BOARD OF EDUCATION OF THE CITY SCHOOL) NO. 84-CV-80C
DISTRICT OF THE CITY OF NORTH TONAWANDA,)
NEW YORK, and NORTH TONAWANDA TEACHERS)
ASSOCIATION,)
)
Defendants.)

SUPPLEMENTAL MEMORANDUM OF LAW FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

The Commission submits this supplemental memorandum in order to address one of the arguments raised by another *amicus*, the American Association of Retired Persons (AARP).[1]

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[1] Inasmuch as AARP appears to misconstrue the thrust of the Commission's original submission in this case, the Commission believes that it would be helpful to summarize its position. The Commission believes that a *voluntary* early retirement incentive plan, properly drafted, provides older workers with a valuable option to terminate their employment in exchange for enhanced retirement benefits or freely to reject those benefits and continue working without penalty. The Commission believes that it would be unfortunate if the ADEA were used as a sword unreasonably to deny older employees the opportunity to avail themselves of such a valuable option.

The AARP's approach would presumptively invalidate age based early retirement incentive plans which do not satisfy a mechanistic application of the "equal benefit or equal cost" principle. As discussed in the Commission's original submission, this represents an unduly rigid application of the ADEA.
[Footnote continued]

The AARP contends that the Supreme Court's recent decision in Fort Halifax Packing Co. v. Coyne, ___ U.S. ___, 107 S.Ct. 2211 (1987), repudiates the approach of the court of appeals on one of the issues in this case. See AARP Brief at 9-13. According to AARP, the rationale of the Fort Halifax decision requires a conclusion that the defendants' early retirement incentive plan does not constitute an "employee benefit plan" under Section 4(f)(2) of the ADEA. For reasons stated below, the Commission disagrees with AARP's reading of Fort Halifax.[2]

In Fort Halifax, the Supreme Court considered whether a state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing is preempted by ERISA. In deciding the case, the Court was required

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[1] [Footnote continued]
The ADEA is flexible enough to embrace an early retirement incentive plan, unless the plan is a "subterfuge" to evade the equal employment opportunity purposes of the ADEA. Where retirement eligible employees are afforded a truly voluntary opportunity to participate in such a plan, and where the employer has a legitimate business reason for imposing the specific age limitations in the plan, the Commission does not share the concern of AARP that failure to satisfy the "equal benefit or equal cost" principle makes the plan an unlawful "subterfuge to evade the purposes of th[e ADEA]."

[2] The Commission notes that AARP's brief disputes some of the fact assumptions on which the court of appeals relied in rendering its decision. See AARP Brief at 3 and n.3. The Commission's original submission to this Court was based on the facts as stated in the opinion of the court of appeals. The Commission declines the invitation of AARP to discuss this case as though it contained different facts. While it is entirely appropriate that the Commission address the facts given as amicus curiae, the excursions urged by AARP would be more appropriately dealt with by the Commission in rulemaking proceedings than through litigation.

to determine whether a severance payment mandated by state law related to an "employee benefit plan" within the meaning of ERISA and, thus, was subject to its pre-emption provision. The Court concluded that the state law was not pre-empted, because the one-time severance payments did not constitute an "employee benefit plan." 107 S.Ct. at 2217-18 (emphasis in original).[3]

The Court's holding was based on fundamental differences between an "employee benefit" and an "employee benefit plan." The Court concluded that the state law mandated nothing more than payment of an "employee benefit," and did not require an employer to establish an on-going "employee benefit plan." The Commission agrees that the Court's reasoning is "directly applicable to the challenged incentive benefit here" (AARP Brief at 10), albeit only for the purpose of distinguishing defendant's on-going employee benefit plan in this case from the one-time employee severance pay benefit at issue in Fort Halifax.

The Supreme Court described the situation before it in the Fort Halifax case as follows (107 S.Ct. at 2218):

> The [state law] requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation. The employer assumes no responsibility to pay benefits on a regular basis,

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[3] The Commission agrees that the phrase "employee benefit plan" should be interpreted consistently in both the ADEA and ERISA. See AARP's Brief at 11, n.7.

> and thus faces no periodic demands on its assets that create a need for financial coordination and control. Rather, the employer's obligation is predicated on the occurrence of a single contingency that may never materialize. The employer may well never have to pay the severance benefits. To the extent that the obligation to do so arises, satisfaction of that duty involves only making a single set of payments to employees at the time the plant closes. To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility.

The Commission believes that defendants' early retirement incentive plan qualifies as an "employee benefit plan" under this reasoning. First, the incentive plan is not triggered by a single, non-recurring event (such as the plant closing at issue in Fort Halifax), but is instead on-going in nature. The plan has been in existence since 1979 and, presumably, teachers have taken early retirement at various times since then and will continue to do so periodically in the future.

Second, while one option of defendants' incentive plan provides a lump-sum payment, another option provides paid-up medical insurance from the date of retirement (at ages 55-60) until the retiree attains age 65. Thus, the incentive plan creates a continuing financial obligation for the defendant School Board, since insurance premiums must presumably be paid for each retiree on a periodic basis for as much as 10 years. Although the record is silent on this point, it is probable that the plan would require some administrative scheme to meet the employer's obligations, which also include periodic lump-sum payments of up to $10,000 per retiree.

Third, unlike a state law applicable to every employer, defendants' incentive plan does not cover "a single contingency which may never materialize." The defendant School Board negotiated this incentive plan with the defendant Union for actual use. The fact that the plan has reappeared in successive collective bargaining agreements would seem to indicate that the plan is operative and that teachers are continuing to take early retirement under its terms.

Fourth, unlike the state mandated severance pay benefit, defendants' early retirement incentive plan does not exist in isolation. As the court of appeals has already pointed out in this case, the incentive plan is "functionally related to" and provides "a supplement to an underlying retirement plan," which qualfies as an "employee benefit plan" under the express terms of Section 4(f)(2) of the ADEA. 785 F.2d at 54-55.

For these reasons, the Commission believes that the Port Halifax decision supports the conclusion that defendants' early retirement incentive plan qualifies as an "employee benefit plan." At the very least, it does not require the opposite conclusion espoused by AARP.[4]

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[4] In any event, because the court of appeals has already expressly held that defendants' plan is an "employee benefit plan" under the ADEA (785 F.2d at 54-56), this Court is precluded from re-examining the issue. See Doe v. New York City Dept. of Social Services, 709 F.2d 782, 788 (2d Cir. 1983), quoting from United States v. Cirami, 563 F.2d 26, 32 (2d Cir. 1977): "Under one prong of the law of the case doctrine, 'When an appellate court has once decided an issue, the trial court, at a later stage of the litigation is under a duty to follow the appellate court's ruling on that issue.'"

[Footnote continued]

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4/ [Footnote continued]

Under another prong of the law of the case doctrine, the court of appeals may reconsider its own earlier decision where, *inter alia*, there has been "an intervening change of controlling law," such as a Supreme Court ruling, which makes the earlier decision "clear error." *Doe* v. *New York Dept. of Social Services*, *supra*, 709 F.2d at 789-90. While the Commission does not believe that *Fort Halifax* requires any change in the court of appeals decision on the "employee benefit plan" issue, if this Court disagrees, it may certify the issue for an interlocutory appeal pursuant to 28 U.S.C. §1292(b). However, because "'[m]ere doubt' of such a change is insufficient to open a matter for full reconsideration" (*id.* at 790 n.9), the Commission does not believe that an interlocutory appeal is warranted in this case.

AARP argues that reconsideration is justified, in part because the rationale of *Fort Halifax* "implicitly affirms" several ADEA decisions which it views as contrary to the court of appeals ruling in this case. *See* cases discussed in AARP Brief at 11-13. Even assuming *arguendo* that AARP is correct, it would not warrant reconsideration of this case, because the court of appeals has already considered those decisions and has concluded that they are distinguishable. *See* 785 F. 2d at 54.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

SARAH M. CIPRIANO and JEUNE M. MILLER,
Plaintiffs,
v.
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NORTH TONAWANDA, NEW YORK, and NORTH TONAWANDA TEACHERS ASSOCIATION,
Defendants.

NO. 84-CV-80C

MEMORANDUM OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

This action under the Age Discrimination in Employment Act ("ADEA") is now before the Court on Plaintiffs' motion for summary judgment, as well as for further consideration on remand from the court of appeals. *See Cipriano* v. *Board of Education of the City School District of the City of North Tonawanda*, 785 F.2d 51, 59 (2d Cir. 1986). The U.S. Equal Employment Opportunity Commission (the "Commission") has already submitted two memoranda of law as *amicus curiae* in the instant action. The Commission submits this additional memorandum in order to comment on Plaintiffs' recent motion for summary judgment.

Facts

For purposes of this memorandum, the Commission adopts Plaintiffs' "Statement of Material Facts Not in Dispute" and the "Statement of Facts" in the memorandum supporting their motion for summary judgment. See Pltfs' Mem., at pages 5-11.

Summary

The Commission takes the position that it is lawful under Section 4(f)(2) of the ADEA to offer an age-based early retirement incentive plan, provided that (1) all retirement eligible employees are given an opportunity to voluntarily participate in the plan, and (2) there is a legitimate business reason for structuring the plan with specific age limitations. Applying these principles to the facts of this case, the Commission believes that the Court may properly grant summary judgment, in part to Plaintiffs and in part to Defendants.

Plaintiffs are entitled to judgment on their individual ADEA claims, because, due to their age, they were never given an opportunity to voluntarily participate in Defendants' early "Retirement Incentive" plan for teachers. Therefore, Plaintiffs should recover $10,000 each in lost benefits, plus interest. In addition, they should recover an equal amount as liquidated damages, because Defendants' unlawful conduct was "willful" within the meaning of the ADEA.

Notwithstanding these willful violations, Defendants are entitled to a judgment declaring that their "Retirement Incentive" plan presently qualifies for the Section 4(f)(2) exception. As explained below, all retirement eligible teachers now have identical opportunities to voluntarily participate in the plan, and there is a legitimate business reason for an age 60 limitation on continuing eligibility to participate.

Argument

I. PLAINTIFFS ARE ENTITLED TO JUDGMENT ON THEIR INDIVIDUAL ADEA CLAIMS, BECAUSE, DUE TO THEIR AGE, THEY NEVER WERE AFFORDED AN OPPORTUNITY TO VOLUNTARILY PARTICIPATE IN DEFENDANTS' EARLY RETIREMENT INCENTIVE PLAN.

The courts have ruled that, "[i]n general, an employer's adoption of an early retirement plan does not create a prima facie case of age discrimination under the ADEA." Bodnar v. Synpol, Inc., 843 F.2d 190, 192 (5th Cir. 1988), and cases cited. See also the Commission's interpretive guideline, 29 CFR 1625.(f): "Neither section 4(f)(2) [of the ADEA] nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option." As explained by Judge Easterbrook in Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987):

> Provided the employee may decline the [early retirement] offer and keep working under lawful conditions, the offer makes him better off. He

> has an additional option, one that may be ... worth a great deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He may also elect to keep working and forfeit the package. This may put him to a hard choice; he may think the offer too good to refuse; but it is not Don Corleone "make him an offer he can't refuse." "Your money or your life?" call for a choice, but each option makes the recipient of the offer worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial. That the benefits may overwhelm the recipient and dictate the choice cannot be dispositive. [Id. at 826.]

The problem in this case is that Plaintiffs never were offered the desirable "choice" of participating in Defendants' early "Retirement Incentive" plan for teachers. When the current plan was first implemented in 1980, eligibility to participate was limited to teachers "between the ages of 55 and 60." See Article XIX of Defendants' "Contract ... for the Period July 1, 1980 - June 30, 1983," at page 56, Pltfs' Exh. F. At the time, Plaintiffs were already over age 60. Pltfs' Statement of Material Facts, nos. 1 and 2. Therefore, solely because of their age, they were denied an opportunity to voluntarily elect a $10,000 retirement incentive benefit. See Pltfs' Statement of Material Facts, no. 6.

The Commission takes the position that it is lawful under Section 4(f)(2) of the ADEA to offer an age-based early retirement incentive plan, provided that (1) all retirement eligible employees are afforded an opportunity to voluntarily participate in the plan, and (2) there is a legitimate business reason for structuring the plan with specific age limitations. See the Commission's first memorandum of law, at pages 5, 26-34. Applying these principles to the facts of this case, the Commission concludes that Plaintiffs should prevail on their individual ADEA claims, because they were never afforded an opportunity to voluntarily participate in Defendants' plan. See id., at pages 29-31.

This conclusion is not altered by the fact that the Plaintiffs were eligible to participate in an earlier version of Defendants' plan. See the January 1979 "Addendum to Contract ... for the Period July 1, 1976 to June 30, 1979," at paragraph 6, Pltfs' Exh. B. This 1979 plan offered less benefits than Defendants' current "Retirement Incentive" plan: in the Commission's view, a critical difference.[1]

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[1] Defendants' 1979 plan provided teachers only with health insurance "from the date of retirement until reaching the age of 65." Pltfs' Exh. B, at para. 6. Plaintiffs were already age 63 in 1979. See Pltfs' Statement of Material Facts Not in Dispute, nos. 1, 2. Therefore, the retirement incentive benefit would not have been as valuable to them as it would have been to younger teachers. See Dorsch v. L.B. Foster Co., 728 F.2d 1421 (7th Cir. 1986) (lawful under the ADEA to provide an identical benefit to all early retirees, even though the cash value of the benefit is greater for younger retirees, because the benefit is eliminated when retirees attain age 62).

Defendants' current plan, implemented in 1980, provides substantially greater benefits. See Pltfs' Exh. V, at p. 60. Under Option A, teachers receive health insurance until age 65, as well as the sum of $2,000 and a further $50 for each complete year of service beyond 20 years. Under Option B, teachers receive the sum of $10,000. Because Plaintiffs were age 64 when this plan was implemented, their most valuable option--if they had been eligible to participate--surely would have been the lump sum payment of $10,000.

Because of the substantial disparity in benefits, eligibility to participate in the earlier plan cannot offset Defendants' subsequent denial of any opportunity for Plaintiffs to participate in the current plan.

The Commission therefore concludes that Plaintiffs are entitled to summary judgment on their individual ADEA claims. Under the principle of make-whole relief, they should recover the amount of the lost retirement incentive benefit, $10,000 each, plus prejudgment interest.

II. DEFENDANTS' VIOLATIONS WERE "WILLFUL," BECAUSE THE USE OF AN EXPRESS AGE LIMITATION--WITHOUT TAKING ANY STEPS TO RESOLVE STATED CONCERNS ABOUT THE LEGALITY OF SUCH AN AGE LIMIT--CONSTITUTED "RECKLESS DISREGARD" OF THE PROHIBITIONS OF THE ADEA.

An ADEA violation is "willful," for purposes of awarding liquidated damages and determining timeliness of an action, if a defendant "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 126 (1985). See also McLaughlin v. Richland Shoe Co., ___ U.S. ___, 56 U.S.L.W. 4433, 4435, n.13 (No. 86-1520, May 16, 1988) ("reckless disregard" standard requires proof of something more than unreasonable conduct). The Commission agrees with Plaintiffs (Mem., at pages 29-32) that, under this standard, Defendants' violations were "willful" within the meaning of the ADEA.

The facts show that, when Defendants negotiated their

"Retirement Incentive" plan, concerns were expressed about the legality of using an age 60 limitation on eligibility to participate. See Pltfs' Statement of Material Facts Not in Dispute, no. 16. Despite these stated concerns, Defendants rejected a "grandfather" clause--similar to a clause used in an earlier plan--which would have provided teachers who were already over age 60 an opportunity voluntarily to participate in the new plan. Pltfs' Exh. I, at p. 3, para. 3; Rooney Dep. at pp. 36, 43. Defendants knew that, absent such a clause, the plan would deny teachers like the Plaintiffs an opportunity to receive a $10,000 benefit available to other retirement eligible teachers then under age 60. Pltfs' Exh. I, at p. 1.

On these facts, the Commission believes that Defendants acted in "reckless disregard" of the ADEA's prohibitions, because they did not take any affirmative steps to resolve concerns about the use of an explicit age limitation with known adverse consequences for teachers already over age 60. See Pltf's Statement of Material Facts Not in Dispute, at nos. 16-19. In the Commission's view, any use of an express age limit which operates to the obvious detriment of older employees would constitute reckless disregard of the ADEA's broad prohibition of employment discrimination based on age, unless the specific type of limitation is directly supported by caselaw, regulations, or at least the justifiable opinion of counsel.

III. DEFENDANTS' EARLY RETIREMENT INCENTIVE PLAN IS PRESENTLY LAWFUL, BECAUSE ALL TEACHERS NOW HAVE THE SAME OPPORTUNITY VOLUNTARILY TO RETIRE AT AGES 55-60, AND BECAUSE THERE IS A LEGITIMATE BUSINESS REASON FOR THE AGE 60 CUTOFF OF ELIGIBILITY TO PARTICIPATE IN THE PLAN.

Defendants' current early retirement incentive plan has been in operation, without substantive change, for almost 8 years. Compare "Article XIX - Retirement Incentive" in Defendants' contract for 1980-83, Pltfs' Exh. F, at pages 56-57, with the same article in the contract for 1984-88, Pltfs' Exh. V, at pages 60-61. As a result, with the possible exception of any remaining individuals similarly situated to Plaintiffs, all currently employed teachers have had or will have the same six-year "window" of opportunity to participate in the on-going plan. From age 55 through age 60, they may voluntarily elect to retire in exchange for $10,000 in benefits provided under Defendants' plan, or they may voluntarily elect to continue working for much more in wages and employee benefits. As explained in EEOC's first memorandum of law (at pages 29, 30-31), the Commission believes that this satisfies the equal employment opportunity purposes of the ADEA.

Moreover, the Commission believes the age 60 limit on eligibility to participate in Defendants' early retirement incentive plan is justified by a legitimate business reason. From the perspective of the Defendant school system, removal of the age limit would largely negate the incentive aspect of the plan. Absent a maximum age limit, there no longer would be any reason for teachers to retire earlier than otherwise intended, because they would in any event receive the $10,000 benefit when they finally chose to retire. The retirement "incentive" thus would be converted to a retirement "bonus" and, in effect, would be transformed from the intended money saving device into an unintended new expense of employing teachers. Based on this analysis, the Defendant would have no reason to continue the early "Retirement Incentive" plan. In these circumstances, the plan would be discontinued, and teachers would lose a valuable early retirement option. See the automatic rescission clause in Defendants' "Retirement Incentive" plan, Pltfs' Exh. V, at pages 60-61.

The purpose of the Retirement Incentive plan, from the perspective of the Defendant school system, is to reduce payroll costs for teachers. Pltfs' Statement of Material Facts Not in Dispute, no. 7; Rooney Dep. at p. 51. This purpose is achieved by inducing higher paid senior teachers to voluntarily retire as early as possible, and by replacing them with lower paid new hires. Beno Dep. at p. 20; Rooney Dep. at p. 51. Because of the large salary differentials between senior teachers and entry level teachers, this retirement-and-replacement practice resulted in large payroll savings for the Defendant school system, despite the payment of $10,000 retirement incentives. See Pltfs' Statement of Material Facts Not in Dispute, no. 8.

There is no doubt that this cost savings retirement-and-replacement practice would be unlawful if accomplished via involuntary retirements and discriminatory hiring. See Sections 4(a)(1) and 4(f)(2) of the ADEA. However, there is no claim of discriminatory hiring in this case; and, the Commission believes that the voluntary nature of any retirements requires a conclusion that Defendants' plan is not a "subterfuge to evade the purposes of th[e ADEA]." Section 4(f)(2).

The Commission recognizes that the court reached a very different conclusion in Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988), petition for cert. filed sub nom. Cook County College Teachers Union v. City Colleges of Chicago, 56 U.S.L.W. 3791 (No. 87-1831, May 4, 1988): a decision which characterizes "the proper treatment of early retirement programs [as] the most difficult question under the [ADEA]." 837 F.2d at 317. In Karlen, the court of appeals ruled that it is unlawful under Section 4(f)(2) "[t]o withhold benefits from older persons in order to induce them to retire" by a specified age, unless the age-based benefit reductions are justified by proof of "a close correlation between age and cost ...." Id., at 319, 320. See discussion in Pltfs' Mem., at pp. 24-29.

The Commission did not participate in the Karlen case; and, thus, the court was not aware of the Commission's views. For example, the Karlen court was unaware of the Commission's view that the "equal benefit or equal cost" principle, which is embodied in the Commission's interpretive guidelines, should not be the exclusive test for determining whether a voluntary early retirement incentive plan qualifies for the Section 4(f)(2) exception. See Commission's first memorandum of law, at pp. 26-29. Accordingly, it is not suprising that the court concluded, in mistaken reliance on the Commission's supposedly uniform "regulation," that proof of equal benefits or equal costs is required "to shelter in the safe harbor of section 4(f)(2)." 837 F.2d at 319.

However, while thus disagreeing with the rationale of the Karlen decision, the Commission nonetheless agrees with the result in that case. According to the court's opinion, the employer established its "Early Retirement Program" as a mere proxy for involuntary retirement, after losing a court battle to retain its age-65 mandatory retirement policy. 837 F.2d at 316. In such circumstances, the Commission agrees with the Karlen court that the employer "cannot be allowed by indirection to reinstitute what was for so long the age-65 mandatory retirement norm." Id. at 320. See also the Commission's first memorandum of law, at pages 33-34, which takes the view that precisely such "proof of the employer's age discriminatory intent" will defeat a claim that any voluntary early retirement incentive plan is sheltered by the Section 4(f)(2) exception.

In the instant case, however, there is no evidence that

Defendants intended their early retirement incentive plan as a mere proxy for involuntary retirement. Instead, the facts indicate that the plan was established as a legitimate age-related cost savings measure and, except for the start-up period, was implemented by means of truly voluntary early retirements.[2]

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[2] For this reason, the instant case is factually distinguishable from Karlen v. City Colleges of Chicago, supra, 837 F.2d 314. In Karlen, the employer claimed that "its main purpose was 'to realize financial savings by replacing older faculty members earning a higher salary with younger faculty members at the lower end of the salary schedule'" (id., at 316). However, the evidence failed to show such a legitimate age-related cost consideration; and instead, demonstated only the employer's intention to continue by a different means its unlawful age-65 mandatory retirement policy. Id., at 320. This failure to prove the alleged age-related cost reason is not surprising since, according to the plaintiff employees, the employer's "argument is contradicted by the record." See Plaintiffs-Respondents' "Brief in Opposition to Petition for Writ of Certiorari," at p. 11, copy attached.

> Age has nothing to do with level of salary [at the City Colleges of Chicago]. At any given age, employees' salaries varied widely, as did their seniority and accumulated sick leave. Plaintiffs also demonstrated that the average salary of the 65-year-old was less than that of the 60-year-old, thereby raising serious doubts about the defendants' assertions that older employees were the highest paid. [Ibid.]

In contrast, the undisputed facts of the instant case demonstrate that there are legitimate age-related cost considerations underlying Defendants' early retirement incentive plan; i.e., the direct relation between teachers' increasing salary rates and their increasing age-related seniority. See Pltfs' Statement of Material Facts Not in Dispute, no. 8; see also the "Annual Salary Schedules for Teachers," Pltfs' Exh. F, Appendix IA (schedule for 1980-81), and Pltfs' Exh. V, Appendix I (schedule for 1984-88). Those schedules show that salary rates for teachers increase on an annual "step" basis in direct relation to increasing seniority.

Conclusion

For the reasons stated above, this Court may properly grant summary judgment. Plaintiffs are entitled to judgment on their individual ADEA claims, including an award of lost benefits in the amount of $10,000 each, plus interest and liquidated damages. Defendants are entitled to a judgment declaring that their present early "Retirement Incentive" plan is lawful under Section 4(f)(2) of the ADEA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 26th day of May, 1988, true copies of the foregoing "Memorandum of Amicus Curiae Equal Employment Opportunity Commission in Response to Plaintiffs' Motion for Summary Judgment" were served by postage pre-paid mailing to the following counsel of record:

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to grips with the problem now will impose a far greater loss, counted in dollars and lives, in the future.

IT IS HEREBY ORDERED that defendants, Governor Edward DiPrete and Director John Moran, are in contempt of court for having failed to comply with the following provisions contained in standing orders of this Court: the prohibition against housing detainees in dormitories, the limitation on double-celling any pre-trial detainee for more than thirty days, and the population cap of 250 persons at the ISC.

IT IS FURTHER ORDERED that defendants shall file with the Court by November 21, 1988 a specific and detailed plan, to be approved by the Court, which will ensure that the population of the present 168-cell ISC will be maintained at no more than 250 persons, that dormitory housing of detainees will cease, and that no detainee will be double-celled for more than thirty days. This plan must describe how the Department of Corrections intends to house its detainee population in the next twelve months. The plan must consider, at a minimum, the rate of increase in the number of detainees in recent months, the total number of detainees expected to be housed, the predicted security classifications of those detainees, the restrictions ordered by this Court, and the conditions of confinement.

IT IS FURTHER ORDERED that defendants may purge themselves of contempt by implementing, by February 20, 1989, the above-mentioned plan to: 1. reduce the population at the ISC to no more than 250 persons; 2. refrain from housing pre-trial detainees in dormitories; and 3. double-cell no pre-trial detainees for more than thirty days.

IT IS FURTHER ORDERED that if defendants fail to file a plan with the Court by November 21, 1988, or if they fail to bring the ISC into compliance with the court orders by February 20, 1989, fines will accrue at the rate of $50 per day for each detainee held in the ISC in excess of the 250 population limit. At a population level of 450, the defendants would incur a fine of $10,000 each day.

If the overcrowding crisis persists in spite of these sanctions, the Court will reconsider its selection of sanctions.

Sarah M. CIPRIANO and Jeune M. Miller, Plaintiffs,

v.

BOARD OF EDUCATION OF the CITY SCHOOL DISTRICT OF the CITY OF NORTH TONAWANDA, NEW YORK; and North Tonawanda United Teachers, Defendants.

No. CIV-84-80C.

United States District Court,
W.D. New York.

Dec. 7, 1988.

As Amended Dec. 16, 1988.

Retired school teachers brought action alleging that plan providing incentives for early retirement, for which they were ineligible due to their age, violated the Age Discrimination in Employment Act. The United States District Court for the Western District of New York entered summary judgment in favor of school and union. The Court of Appeals, 785 F.2d 51, reversed and remanded. On remand, the District Court, Curtin, Chief Judge, held that: (1) plan did not generally violate Act as it was voluntary in nature and had legitimate business basis; (2) Act as applied to retired teachers was discriminatory; and (3) only injunctive relief could be sought against union.

Motions granted in part and denied in part.

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menting a more comprehensive solution to the overcrowding crisis.

1. Civil Rights ⇐9.15

School district's early retirement incentive plan, negotiated pursuant to collective bargaining agreement, which was available to teachers between ages of 55 and 60 was generally valid as a bona fide employee benefit plan under the Age Discrimination in Employment Act; voluntary nature of plan and significant cost reductions under plan demonstrated its lawfulness. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

2. Civil Rights ⇐43

Evidence of school district's economic savings as result of its voluntary early retirement incentive plan was admissible to demonstrate its legitimate business reasons for adopting the plan. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

3. Civil Rights ⇐9.15

Any early retirement benefit plan must be carefully tailored to give all workers a chance to make that decision without arbitrarily discriminating against any worker or group of workers solely because of age. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

4. Civil Rights ⇐9.15

Employer may lawfully offer an early retirement incentive plan provided that all retirement eligible employees were afforded an opportunity to voluntarily participate and there was a legitimate business reason for structuring the plan within specific age limitations. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

5. Civil Rights ⇐44(6)

Failure of retired teachers to present evidence demonstrating general invalidity of school district's early retirement plan, by failing to demonstate district lacked legitimate business reason for plan, precluded their general challenge to the plan. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

6. Civil Rights ⇐9.15

School district's failure to offer those teachers over 60 years of age its early retirement incentive option, because those teachers would be retiring anyway, was a willful violation of the Age Discrimination in Employment Act, as plan, as applied to those teachers over 60 was not voluntary, and where union and school district when negotiating plan's detail failed to consider age discrimination aspects of plan. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

7. Labor Relations ⇐751

While union had willfully participated in adoption of early retirement incentive plan which discriminated against certain teachers by not offering them an opportunity to participate, injunctive relief was only relief available against it. Age Discrimination in Employment Act of 1967, § 4(f)(2), as amended, 29 U.S.C.A. § 623(f)(2).

David Gerald Jay, Buffalo, N.Y., for plaintiffs.

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Ira Paul Rubtchinsky, Albany, N.Y., for defendant North Tonawanda United Teachers.

Christopher C. Mackaronis, Washington, D.C., for amicus curiae American Ass'n of Retired Persons.

Charles A. Shanor, Washington, D.C., for amicus curiae E.E.O.C.

CURTIN, Chief Judge.

This case is before the court on remand from the Second Circuit, *Cipriano v. Board of Education of the City School District of the City of North Tonawanda, New York*, 785 F.2d 51 (2d Cir.1986), reversing this court's order dated April 2, 1985 (Item 17), which granted summary judgment in favor of defendants in an action under the Age Discrimination in Employment Act [ADEA], 29 U.S.C. §§ 621-634. Plaintiffs now move for summary judgment on their claims (Item 46; *see also* Item 57), and defendants cross-move for summary judgment on their affirmative defenses (Items 51, 53).[1] The Equal Employment Opportunity Commission [EEOC] and the American Association of Retired Persons [AARP] have filed briefs, and have appeared before the court, as *amicus curiae* (Items 35, 36, 40, 52, 55).

The principal question for the court on remand is whether defendants have made a showing, sufficient to withstand plaintiffs' summary judgment motion, that the age-based exclusion of plaintiffs from defendants' voluntary early retirement incentive plan was based on legitimate business reasons and therefore was not a subterfuge to evade the purposes of the ADEA. 785 F.2d at 58; *see* 29 U.S.C. § 623(f)(2).

Factual and Procedural History

In order to decide the motions now before it, it will be necessary for the court to set forth the undisputed facts and procedural history of the case in some detail. Plaintiff Sarah M. Cipriano was employed as a teacher in the North Tonawanda City School System by defendant Board of Education of the City School District of the City of North Tonawanda (the Board) from September, 1945, until her retirement at age 65 in June, 1981, a total of 36 years. Jeune M. Miller was employed as a teacher in the same school system from 1939 through 1943 and from 1961 until her retirement at age 65 in June, 1981, a total of 24 years. Both plaintiffs were subject to the terms of a collective bargaining agreement negotiated between the Board and the Union. That agreement, effective July 1, 1980 through June 30, 1983, contained a provision offering voluntary retirement incentives to members of the bargaining unit "between the ages of 55 and 60 who retired effective between July 1 and February 1 in any of the three years of the agreement and had completed 20 years of service under the New York State Teachers Retirement System." 785 F.2d at 52. Such employees could elect either of two options. Under Option A, the Board agreed to reimburse retirees for health insurance premiums until the retiree reached age 65, and to pay a lump sum of $2,000 plus $50 for each additional year of service beyond 20 years. Under Option B, the Board would pay the retiree a lump sum of $10,000. Since both plaintiffs had passed their 61st birthday before July 1, 1980, they were ineligible for participation in this incentive plan.[2]

Plaintiffs commenced this action on January 24, 1984, against both the Board and the Union, alleging that the retirement incentive plan negotiated by those defendants discriminated against plaintiffs because of their age in violation of the ADEA. Item 1, ¶¶ 5, 8–11, 13. Each claimed as damages the $10,000 she would have received under Option B of the plan, if the incentive plan had applied to her at the time of her retirement, as well as punitive damages based on the defendants' allegedly willful violation of the ADEA, injunctive relief nullifying the retirement incentive plan, attorney's fees, costs, and other appropriate relief. Item 1.[3]

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[1] During oral argument before the court on July 15, 1988, counsel for the Board asked the court to consider its brief in opposition to plaintiff's motion as a cross-motion for summary judgment. *See* Item 61, pp. 98–103.

[2] On May 23, 1981, shortly before their retirement, plaintiffs filed complaints with the EEOC alleging that the incentive plan constituted age discrimination in violation of the ADEA. The EEOC is alleged to have sent a letter of violation to defendants on April 27, 1982, and, since that date, to have attempted to conciliate plaintiffs' claim without commencing formal action on plaintiffs' behalf. Item 1, ¶¶ 11–15; *see also* 785 F.2d at 52.

[3] The complaint originally named the North Tonawanda Teachers Association [NTTA] as a defendant, but was amended to substitute the Union. Item 10. On March 1, 1984, the NTTA filed a motion to dismiss the complaint on various grounds. Item 5. As noted by the Court of Appeals, 785 F.2d at 52, this motion was treated by this court as having been filed on behalf of the Union and the Board, and was eventually converted to a motion for summary judgment. The Board filed its answer to plaintiffs' complaint on March 5, 1984, raising ten affirmative defenses. Item 7. On April 25, 1986, subsequent to remand, the Union filed its answer (Item 23), and has moved to amend its answer to include additional affirmative defenses. Item 33.

In its order granting summary judgment for defendants, this court found that the retirement incentive plan was consistent with the objectives of the ADEA, was a bona fide employment benefit plan under § 4(f)(2) of that act,[4] and was not adopted as a subterfuge to evade the purposes of the ADEA. Item 17, pp. 2–3. On appeal, the Second Circuit found that defendants had, as movants for summary judgment, satisfactorily sustained the burden of showing that the incentive plan was a bona fide retirement plan for the purposes of § 4(f)(2), 785 F.2d at 54, but reversed and remanded because "defendants did not bear their burden of showing that the incentive plan was 'not a subterfuge to evade the purposes of' the ADEA sufficiently to justify dismissal of the complaint without a trial." *Id.* at 57. The court made it clear that it was neither endorsing nor condemning the particular incentive plan at issue, or voluntary retirement plans in general. *Id.* at 59.

Subsequent to the remand, the parties engaged in discovery consisting primarily of the depositions of plaintiffs (Item 28), the depositions of Harry H. Beno (Superintendent of Schools, North Tonawanda City School District) and Calvin H. Cornwell (Teacher (retired), North Tonawanda City School District) (Item 39), and the deposition of James Rooney (Chief Labor Negotiator, Board of Education of the City School District of the City of North Tonawanda).[5] Defendants have also filed answers to plaintiffs' interrogatories (Items 29, 31). It is primarily on the basis of information adduced as a result of this limited discovery that plaintiffs make their present motion for summary judgment.

Summary of the Arguments

In support of their motion, plaintiffs contend that the depositions and interrogatories in the record provide uncontroverted evidence leading to but one conclusion—that defendants' motives for adopting the incentive plan were admittedly discriminatory and, when coupled with a *per se* violation of the ADEA as already found by the Second Circuit, require the entry of summary judgment in plaintiffs' favor. Item 46, pp. 15–18. According to plaintiffs, the Beno and Rooney depositions clearly demonstrate that the Board's exclusive motive in implementing the early retirement incentive was to save money by replacing older, higher paid teachers with younger, entry level employees. Plaintiffs contend that the Union's economic motive for adopting the plan—*i.e.*, to preserve the jobs of younger teachers by offering older teachers financial encouragement to retire early—was discriminatory as well, as evidenced by the Rooney and Cornwell depositions. Plaintiffs also contend that there is no rational business justification for excluding teachers over age 60 from the plan (*id.*, pp. 18–23), and that defendants cannot, nor will they be able to at trial, demonstrate any correlation between age and the cost of the challenged plan so as to "shelter in the safe harbor of section 4(f)(2)." *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), *cert. denied sub nom. Cook Co. College Local 1600 v. City Colleges of Chicago*, — U.S. —, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988); *see* Item 46, pp. 24–29. Additionally, plaintiffs contend that the defendants' violation of the ADEA was "willful," thereby entitling plaintiffs to punitive and liquidated damages and costs. Item 46, pp. 12–13.

In opposition, the Board argues that granting plaintiffs' summary judgment motion would deny it the opportunity afforded by the Second Circuit to factually establish its affirmative defense under § 4(f)(2). According to the Board, the significant cost considerations that factored into the decision to adopt the early retirement incentive plan clearly represent the type of "legitimate business reasons" required by the ADEA. Item 51, pp. 2–6. The Board further contends that since the plan at issue here provided retirement incentive only to those employees between the ages of 55–60, and no incentive (as opposed to a lesser incentive) was offered to those over the age of 60, the plan did not run afoul of the major purpose of the ADEA, which is to discourage the removal of older persons from the workforce. *Id.*, pp. 7–8. Finally, the Board contends that plaintiffs' deposition references are insufficient to establish discriminatory motive, and that the question of "willfullness" is properly one for the jury. *Id.*, pp. 6–7.

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[4] § 4(f)(2), 29 U.S.C. § 623(f)(2), provides in relevant part:

> It shall not be unlawful for an employer ...
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual[.]

[5] The deposition of Mr. Rooney has not been filed with the court, but relevant excerpts of that deposition have been provided by the parties in their briefs.

The Union's argument is somewhat more complicated, at least in a procedural sense. First, the Union renews its motion under Fed.R.Civ.P. 15, filed July 6, 1987 (Item 33), to amend its answer to include affirmative defenses based on the applicable statute of limitations and principles of waiver and estoppel. *See* Item 61, pp. 4–5. With regard to those defenses, the Union contends that the action against it was not timely filed, since plaintiffs knew or should have known of the alleged discriminatory act more than two years before the commencement of the action (Item 53, pp. 18–29); that the complaint should be dismissed since plaintiffs failed to comply with the procedural requirements of the ADEA (*Id.*, pp. 30–31); and that plaintiffs should be estopped from claiming a violation of their rights under the ADEA since they never formally applied for the retirement incentive. *Id.*, pp. 32–33. Second, the Union contends that plaintiffs may not recover money damages against it, since such relief is available only against employers. *Id.*, pp. 15–17. Third, the Union claims that there is a question, yet unresolved by the Supreme Court, as to whether the conduct complained of—*i.e.*, participation in lawful collective bargaining activity—is within the purview of the ADEA. *Id.*, pp. 34–35. Finally, the Union contends that there is sufficient evidence in the record to support its affirmative defense under § 4(f)(2) that it had a legitimate business-based reason for agreeing to the plan. *Id.*, pp. 36–38.

As *amicus*, the EEOC takes the position that plaintiffs are entitled to summary judgment on their ADEA claims since, solely because of their age, they were never given the opportunity to participate in the early retirement plan. Item 55, pp. 3–6. The EEOC also contends that the defendants' violation of the ADEA was "willful" since they acted in reckless disregard of that Act's provisions by failing to take affirmative steps to resolve concerns about the incentive plan's discriminatory effect. *Id.*, pp. 6–7. Finally, adopting a somewhat "solomonic" position, the EEOC urges that the defendants are entitled to a judgment declaring that the incentive plan, as it presently stands, is lawful since it is justified by legitimate age-related cost considerations and, as long as the plan provides a "window" period to allow all employees (including those over 60) to participate, should not be found to be a subterfuge to evade the purposes of the ADEA. *Id.*, pp. 8–12.[6] According to the EEOC, since plaintiffs were never offered that "window" period, summary judgment should be entered on their ADEA claims.

The position of *amicus* AARP adds a further twist to the arguments presented here.[7] According to AARP, the Second Circuit's finding in *Cipriano* that the challenged retirement incentive was a bona fide employee benefit plan for the purposes of § 4(f)(2), 785 F.2d at 54, must be re-examined by this court in light of the subsequent Supreme Court decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), which held that a "one-time lump sum payment triggered by a single event," *id.* 107 S.Ct. at 2218, is not an "employee benefit plan." Item 40, pp. 9–13. AARP also contends that, even if the plan is of the type protected by § 4(f)(2), under the "equal benefit or equal cost" standard embodied in consistent administrative interpretations of that section, the plan is a subterfuge to evade the purposes of the ADEA. *Id.* at pp. 13–23; 35–37. AARP further contends that the EEOC's "new" position on voluntary early retirement incentive plans, set forth at pp. 26–29 of its original *amicus curiae* brief (Item 33) and elaborated upon at oral argument, is contrary to the Commission's own regulations and thus not entitled to any deference. Item 40, pp. 23–35.

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[6] At oral argument on July 15, 1988, counsel for the EEOC presented to the court an advance notice of proposed rulemaking, dated July 7, 1988, as evidence of the EEOC's efforts to deal with the question of the legality of early retirement plans under the ADEA. Such eventual rulemaking will presumably embody the position advanced by the EEOC before this court.

[7] AARP's brief (Item 40), as well as the initial brief of the EEOC (Item 36) was submitted prior to the filing of plaintiffs' motion for summary judgment, but the views presented therein are illuminating and fully consistent with the court's task at this procedural juncture.

At oral argument, counsel for AARP appeared on behalf of plaintiffs as well as in his *amicus* capacity.

Discussion

[1] Section 4(a)(1) of the ADEA makes it unlawful for an employer

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

29 U.S.C. § 623(a)(1). The ADEA has three stated purposes: (1) to promote employment of older persons based on their ability rather than their age; (2) to prohibit arbitrary age discrimination in employment; and (3) to help employers and workers find ways of meeting problems arising from the impact of age on employment. 29 U.S.C. § 621(b).

In its remand order, the Second Circuit made it clear that unless the defendants can meet their burden of establishing the statutory affirmative defense of § 4(f)(2) (*see* note 4, *infra*), the voluntary early retirement incentive plan at issue here "would run afoul of § 4(a)(1)". 785 F.2d at 53.

The 4(f)(2) defense has three elements:

> (1) there must be a bona fide (retirement) plan, (2) the action must have been taken in observance of its terms, and (3) the retirement plan must not have been a subterfuge to evade the purposes of the ADEA.

EEOC v. Home Insurance Co., 672 F.2d 252, 257 (2d Cir.1982). With regard to the first element, the Second Circuit found that the challenged plan, on its face,

> is a "bona fide employee benefit plan" in the sense that employees benefited and substantial benefits were paid to employees who were covered by it.... [W]e see no reason to doubt that the incentive plan, when read as a supplement to an underlying general retirement plan, was a "retirement" plan for the purposes of § 4(f)(2).

785 F.2d at 54. Plaintiffs, through *amicus* AARP, now argue that this holding must be reexamined in light of the intervening Supreme Court decision in *Fort Halifax*. According to plaintiffs, the holding in *Fort Halifax* is clear that a one-time lump-sum cash payment (such as the incentive at issue here) triggered by a single event (such as the plaintiffs' retirement) does not constitute an "employee benefit plan" within the meaning of § 4(f)(2), and thus defendants should not be allowed to avail themselves of the § 4(f)(2) defense. Plaintiffs also cite *EEOC v. Borden's Inc.*, 724 F.2d 1390 (9th Cir.1984); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir.1983), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); and *Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975, 102 S.Ct. 2239, 72 L.Ed.2d 848 (1982), as support for their argument.

Fort Halifax involved an employer's challenge under the Employee Retirement Income Security Act [ERISA] to a Maine state statute requiring employers to provide a one-time severance payment to employees in the event of a plant closing. In finding that the state law was not preempted by ERISA, and that the employer was thus liable for severance pay due to the closing of one of its plants, the Court held that the one-time severance payments triggered by a single event did not constitute an employee benefit plan so as to invoke the protections of ERISA. Noting the basic difference between a "benefit" and a "plan," the Court examined the Congressional intent behind ERISA's preemption provision and found that the major concern in affording employers "the advantages of a uniform set of administrative procedures governed by a single set of regulations ... only arises ... with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." 107 S.Ct. at 2217.

> The requirement of a one-time lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation.... To do little more than write a check hardly constitutes the operation of a benefit plan. Once this single event is over, the employer has no further responsibility. The theoretical possibility of a one-time obligation in the future simply creates no need for an ongoing administrative program for processing claims and paying benefits.

Id. at 2218. In the instant case, however, defendant's retirement incentive involves more than simply a "one-time lump-sum payment triggered by a single event". With the exception of the two plaintiffs, the incentive is offered to all employees who pass through the 55–60 age bracket, and thus is a continuing (rather than one-time) benefit triggered by each employee's voluntary election of the plan (rather than by a single event affecting all employees simultaneously).[8] Moreover, defendants' plan provides the early retiree with a choice of either (A) continued medical benefits until age 65 combined with a $2,000 lump-sum payment, plus $50 for each year of service over 20 years, or (B) a $10,000 lump-sum payment. Therefore, unlike the employer in *Fort Halifax* which, upon the closing of one of its plants, was faced with the statutory duty to "write a check" covering all displaced employees, the employer in the instant case is under a continuing obligation which places "periodic demands on its assets that create a need for financial coordination and control." *Id.*

With regard to the other cases cited by plaintiffs, the court agrees with the thorough analysis undertaken by the Second Circuit in its remand order which found that each of the "plans" at issue in the *Borden's*, *Westinghouse* and *Alford* cases involved fringe benefits that were somehow tied by the employer to the underlying retirement plans, and "could in no way be considered to be functionally related to those plans". 785 F.2d at 55. The incentive plan at issue here, however, increases the compensation available to the employee under the underlying retirement plan in return for leaving the workforce at an earlier age. Since the incentive "is a quid pro quo for leaving the workforce after a certain age and number of years of service, it must be viewed functionally as part of" the underlying retirement plan. *Id.* at 56.

Accordingly, upon reconsideration of the requirements of § 4(f)(2) in light of the *Fort Halifax* decision (and the other authorities cited by plaintiffs), the court finds that the early retirement incentive plan at issue here is a bona fide plan for the purposes of establishing a § 4(f)(2) defense, and that the action complained of—*i.e.*, offering the incentive to younger workers but not to plaintiffs—was taken in observance of the terms of that plan. The focus of the court's inquiry on the pending motions and cross-motions for summary judgment now becomes whether defendants have established element (3) of the *Home Insurance* test, namely that the retirement plan must not have been a subterfuge to evade the purposes of the act.

Defendants' task of disproving subterfuge is a difficult one considering the relative lack of guidance from the courts, Congress, or the EEOC[9] with regard to the type of plan challenged by plaintiffs here. Some courts have held that, in general, an employer's adoption of a voluntary early retirement plan does not in itself create a *prima facie* case of age discrimination, *see Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir.1988), and that such plans are indeed beneficial to the employee. *Henn v. National Geographic Society*, 819 F.2d 824, 826 (7th Cir.1987).[10] In making a determination as to whether the plaintiff has established a *prima facie* case, the courts are guided by the principles embodied in the relevant EEOC regulations which, as they currently stand, provide that

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[8] *See* Exh. F, pp. 56–57, and Exh. V, pp. 60–61, attached to Item 46. As those exhibits reveal, defendants' plan has remained in effect, virtually unchanged, since its adoption in 1980.

[9] Effective July 1, 1979, Congress transferred enforcement authority over the ADEA from the Department of Labor [DOL] to the EEOC. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. § 312 (1978), *reprinted in* 92 Stat. 3781 (1978). The relevant DOL regulations, originally promulgated at 29

> [n]either section 4(f)(2) nor any other provision of the [ADEA] makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

29 C.F.R. § 1625.9(d) (1988). It is undisputed in the instant case, and the Second Circuit so found, that the incentive plan adopted by defendants excluded plaintiffs because of their age, and thus plaintiffs have established a *prima facie* case requiring defendants to satisfy § 4(f)(2).

The purpose of § 4(f)(2) "is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations." 29 C.F.R. § 1625.10(a)(1). Those regulations further provide:

> (a)(1) ... Where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage....
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> ....
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> (d) *"Subterfuge."* ... In general, a plan or plan provision which prescribes lower benefits for older employees on account of age is not a "subterfuge" within the meaning of section 4(f)(2), provided that the lower level of benefits is justified by age-related cost considerations....
>
> (1) *Cost data-general.* Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years....

29 C.F.R. § 1625.10(a)(1), (d), (d)(1) (1987). The regulations further state that any cost comparisons and adjustments made under § 4(f)(2) must be done on a "benefit-by-benefit" basis, which calls for adjustments to be made "in the amount or level of a specific form of benefit for a specific event or contingency", 29 C.F.R. § 1625.10(d)(2)(i), or on a "benefit package" basis, which

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C.F.R. § 860.120 (1970), were continued in effect unchanged by the EEOC in 1979, 44 Fed. Reg. 37974 (June 29, 1979), and were recently recodified at 29 C.F.R. § 1625.10, 52 Fed.Reg. 23811 (June 25, 1987). *See* Item 36, p. 23 n. 17; Item 40, p. 20 n. 17.

[10] The discussion in *Henn* centers around the Second Circuit's opinion in *Paolillo v. Dresser Indus., Inc.*, 813 F.2d 583 (2d Cir.1987), *withdrawn and substituted on rehearing*, 821 F.2d 81 (2d Cir.1987). In its original opinion in the *Paolillo* case, the Second Circuit found that an employer's offering an incentive retirement plan constituted a *prima facie* violation of the ADEA, and much of Judge Easterbrook's opinion in *Henn* was devoted to an explanation of why *Paolillo* was wrong. The Second Circuit panel, however, subsequently withdrew its original *Paolillo* opinion and issued a new opinion, written by Chief Judge Feinberg, which held only that the particular plan before it, as implemented, raised a factual question as to whether the retiring employees had acted voluntarily in accepting the terms of the plan. 821 F.2d at 84. Were it not for the shortness of time given to plaintiffs within which to make their decisions whether to accept early retirement benefits (two of the plaintiffs were given three days, and one of the plaintiffs was given one day), the plan at issue in *Paolillo* would most likely have been approved.

allows for aggregate cost comparisons to be made only if "not used to reduce the cost to the employer or the favorability to the employees of overall employee benefits for older employees." 29 C.F.R. § 1625.10(d)(2)(ii). Finally, § 1625.10(d)(3) provides that:

> Cost comparisons and adjustments under section 4(f)(2) may be made on the basis of age brackets of up to 5 years. Thus a particular benefit may be reduced for employees of any age within the protected age group by an amount no greater than that which could be justified by the additional cost to provide them with the same level of the benefit as younger employees within a specified five-year age group immediately preceding theirs.

29 C.F.R. § 1625(d)(3).

Noting the "continued vitality" of these regulations, 785 F.2d at 58, and the "fairly heavy burden" these regulations impose on the employer, *id.*, the Second Circuit, in remanding, has provided this court some limited further guidance with regard to the concept of "subterfuge" when that term is applied to voluntary, as opposed to involuntary, participation in an early retirement incentive plan.

> While we would not wish to be understood as endorsing every detail of the regulations, we cannot simply disregard them. All that we now decide is that even in the case of voluntary early retirement plans the employer—and also here the union—must come up with some evidence that the plan is not a subterfuge to evade the purposes of the ADEA by showing a legitimate business reason for structuring the plan as it did.
>
> ....
>
> ... The evidence of business reasons required to show that a voluntary early retirement plan is not a subterfuge would almost necessarily be less than what was required to make such a showing in the case of a mandatory plan.

Id. at 58–59. Following the Second Circuit's directive, *id.* at 59, this court granted the application of the EEOC to participate in the case as *amicus curiae* so as to determine the current status of the interpretive regulations and guidelines with respect to the permissible means of structuring voluntary retirement plans. Item 37.

As outlined in its submissions to the court, the EEOC views the regulations, as well as the legislative history underlying the enactment and amendment of the ADEA, as generally allowing employers to provide lower benefits to older workers only where the cost of providing the benefit increases with age. Item 36, p. 25; *see* 29 C.F.R. § 1625.10(a)(1), (d)(1)–(3); *see also Karlen*, 837 F.2d at 319 (where employer uses age as basis for varying retirement benefits, he must prove a close correlation between age and cost to benefit from § 4(f)(2)); *Borden's*, 724 F.2d at 1396 (§ 4(f)(2) enacted to encourage the hiring of older workers by relieving employers of the duty to provide them with equal benefits—where equal benefits would be more costly for older workers). This principle is commonly referred to as the "equal benefit or equal cost" rule.[11] *See* Item 40, pp. 14, 18. The EEOC now argues that this principle should not be automatically applied as the exclusive test for proving the absence of subterfuge in early retirement plans, and especially should not be applied to such plans as the one at issue here where the incentive, and the choice, to retire early is

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[11] The DOL regulations promulgated shortly after the ADEA was enacted articulated the "equal benefit or equal cost" principle as follows:

> Thus, an employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purposes of the Act. A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. § 860.120(a) (1970); *compare with* 29 C.F.R. § 1625.10(a)(1) (1987).

"truly voluntary". Item 36, p. 28–34. According to the EEOC, the employer's burden to demonstrate a legitimate business reason for enacting a voluntary early retirement incentive plan

> will be most effectively met where the specific age limitations are based on and reasonably supported by some objectively measured assessment of increasing cost and/or declining benefit to the employer in providing retirement incentives. For example, a cost/benefit analysis might consider such factors as the anticipated working life of employees relative to "normal" or expected retirement age, and cost of the retirement inducement versus payroll savings to be potentially realized by the employer.

Id. at 33 (footnote omitted). Thus, pending formal rulemaking (*see* note 6 *infra*), the EEOC has provided the court with valuable guidance as to the showing required by a defendant attempting to legitimate a voluntary early retirement incentive plan under § 4(f)(2). It must be reiterated here that the EEOC urges the court to approve the defendants' plan as it currently applies to the teachers affected, not as it applied to plaintiffs when enacted or when plaintiffs retired.

[2] As plaintiffs and *amicus* AARP point out, the analysis adopted by the EEOC is at odds with several cases which have specifically rejected the type of age-based assumptions about economic savings and anticipated work life urged as relevant considerations under § 4(f)(2) by defendants and the EEOC here. In *Geller v. Markham,* 635 F.2d 1027 (2d Cir.1980), *cert. denied,* 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981), the Second Circuit held that a discriminatory hiring policy which excluded teachers with more than five years of experience could not be justified by economic considerations. 635 F.2d at 1034; *see also Marshall v. Arlene Knitwear, Inc.*, 454 F.Supp. 715, 728 (E.D.N.Y. 1978) (Where economic savings and expectation of longer future service are directly related to employee's age, it is a violation of ADEA to discharge the employee for those reasons). In so holding, the Court specifically approved the then-current EEOC regulation establishing that

> a general assertion that the average cost of employing older workers as a group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the [ADEA], unless one of the other statutory exceptions applies.

29 C.F.R. § 860.103(h) (1979). That section was amended in 1981 to provide that:

> A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f)(2) exception to the [ADEA].

29 C.F.R. § 1625.7(f) (1988). AARP would have the court read this current regulation, and the cases cited above, to stand for the proposition that a retirement plan cannot be justified on the basis of cost savings to the employer unless that plan *otherwise* qualifies under § 4(f)(2). In light of the guidance provided by the EEOC, however, as well as distinguishing factors evident in the *Geller* and *Arlene Knitwear* cases, the court refuses to adopt such a restrictive reading. Neither *Geller* nor *Arlene Knitwear* involved voluntary retirement incentive plans, nor did they involve the § 4(f)(2) defense. Therefore, for the purposes of deciding the motions now before it, the court will consider evidence of economic savings as relevant to the defendants' attempt to show legitimate business reasons for structuring the challenged plan as they did.

From the Board's perspective, the reason the age 55–60 limitation was adopted "was a desire to have a real 'incentive', as opposed to a bonus. The incentive was intended to encourage teachers within that age group to retire sooner than they might otherwise have done, allowing hiring and retention of younger personnel at cost savings." Item 29, p. 9 (Board's Answer to Plaintiffs' Interrogatory # 7); *see also* Item 46, p. 2 (Plaintiffs' Statement of Material Facts Not In Dispute, ¶ 7). The cost savings anticipated by the Board was the difference between the salary of an older, more senior teacher (approximately $25,000 per year at the time the plan was adopted) and the salary of a less experienced teacher at the entry level (approximately $10,000). Item 46, pp. 2–3. In other words, while paying the $10,000 incentive to a 60 year-old teacher would cost the Board $10,000, it might have the immediate result of saving the Board $5,000 since it would reduce the payroll by $15,000 (the difference between a salary of $25,000 and a salary of $10,000), minus the cost of the incentive ($10,000). The savings would be even greater on a long-term basis as the cost of the incentive payment becomes factored into the payroll savings as time goes by. From the Union's perspective, the incentive plan was agreed to as a means of retaining jobs by avoiding the layoff of younger, less senior teachers. *Id.*, p. 3; Item 39 (Cornwell Deposition), pp. 125–26. There is little doubt that such reasons would be insufficient under § 4(f)(2) if the adoption of the plan resulted in the involuntary retirement or discriminatory hiring of any employee. However, no such claims are made in the instant case. The record is convincing that any retirement by an employee covered under the plan was, and would be, completely voluntary. The court views this as an important distinction which warrants application of the principles urged here by the EEOC. From an employer's standpoint, the very purpose of offering an early retirement incentive is to afford the employer the opportunity to effect potentially substantial payroll savings without inequitably altering its employment relationship with its workers. Thus, legitimate incentive plans may provide a less harmful method than layoffs for implementing workforce reductions and corporate layoffs while allowing the employer to save more per employee by eliminating higher paid senior positions or replacing the retired workers with lower-paid workers. *See* McMorrow, *Retirement and Worker Choice: Incentives to Retire and the Age Discrimination in Employment Act*, 29 B.C.L.Rev. 347, 366 (1988). At the same time, such incentives undeniably provide a desirable additional option for the employee who may wish to "retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He may also elect to keep working and forfeit the package." *Henn*, 819 F.2d at 826. Furthermore, absent a maximum age limit (here, age 60), the incentive aspect of any such plan would be largely, if not entirely, negated since all employees would ostensibly become eligible for the plan's benefits upon reaching the triggering age. Thus, the "incentive" would be transformed into a "bonus," resulting in a new employment-related cost to the employer without any concomitant benefit. Under such circumstances, there would be neither an incentive for the employee to retire early, since that employee would eventually receive the enhanced benefit in any event, nor an incentive for the employer to offer the plan, since no payroll savings would result.

[3, 4] In light of these considerations, it appears to the court that granting plaintiffs' request for injunctive relief in the instant case, thereby declaring defendants' plan unlawful as it applies to all teachers in the North Tonawanda School System, would not benefit any of the parties to this lawsuit, and may result in the removal as a general matter of an important and valuable employment option for other employers and employees who may desire to implement or choose similar incentive plans. As mentioned above, the critical element in such a plan is "voluntariness." As the Second Circuit has stated, "accepting early retirement is a major decision with far-reaching impact on the lives of the workers and we emphasize that the decision must be voluntarily made." *Paolillo v. Dresser Industries, Inc.*, 821 F.2d 81, 84 (2d Cir. 1987). Thus, any such plan must be carefully tailored to give all workers a chance to make that decision without arbitrarily discriminating against any worker, or group of workers, solely because of age. With these important considerations in mind, the court now finds that an employer may lawfully offer an early retirement incentive plan under § 4(f)(2) of the ADEA provided that (1) all retirement eligible employees are afforded an opportunity to voluntarily participate in the plan, and (2) there is a legitimate business reason for structuring the plan with specific age limitations. Therefore, under this court's interpretation of the relevant regulations, and in light of the guidance provided by the EEOC as to the application of those regulations to voluntary early retirement incentive plans, the court also finds (with respect to the general validity of the challenged plan) that the justifications offered by defendants in the instant case for structuring the plan the way they did constitute legitimate business reasons under § 4(f)(2) of the ADEA.

Plaintiffs (and AARP) argue that such a finding would be at odds with the result reached by the Seventh Circuit in the *Karlen* case. In reversing the district court's entry of summary judgment in favor of defendants on a challenge to a voluntary early retirement plan which offered retirement incentives to persons between the ages of 55 and 69, but which substantially reduced the incentive for those who chose to retire at age 65 or later, the Seventh Circuit found that:

> Nothing in the [ADEA] forbids an employer to vary employee benefits according to cost to the employer; and if, because older workers cost more, the result of the employer's economizing efforts is disadvantageous to older workers, that is simply how the cookie crumbles.... But where, as in the present case, the employer uses age—not cost, or years of service, or salary—as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2).

837 F.2d at 319 (*citing* 29 U.S.C. § 1625.10(a)(1), (d)(1)-(3)). According to plaintiffs, the Seventh Circuit has thereby adopted the "equal benefit or equal cost" rule as the exclusive means of determining subterfuge in an analysis of voluntary early retirement plans under § 4(f)(2). My reading of *Karlen*, however, indicates that case is, on the whole, supportive of the type of plan at issue here. As discussed above, defendants' plan is not keyed to age but to the cost of keeping older workers (age 60 and over) on the payroll, and the cost-savings figures provided by defendants sufficiently demonstrate the legitimacy of their "economizing efforts." The plan objected to in *Karlen* used age 65 as the cutoff point for offering greatly reduced benefits, and no figures were provided to show why the benefits varied with age rather than length of service, or "why the big drop at age 65". More simply stated, the plan in *Karlen* discriminated against those within the group eligible for early retirement but over age 65, while the plan in the instant case offers the same incentive to all employees (with the notable exception of plaintiffs) who reach the age of 55.[12] An employer making such an offer should not be required to demonstrate the same "close correlation between age and cost" demanded of the employer in *Karlen* in order to take advantage of the shelter provided by § 4(f)(2).

While *Karlen* may therefore be read to support the type of retirement incentive plan at issue here, there are several additional distinguishing factors which suggest that this court should not require the same result as that reached by the Seventh Circuit. That court based its holding, at least in part, on the finding that the defendants in that case adopted their retirement plan "[t]o withhold benefits from older persons in order to induce them to retire", 837 F.2d at 320, thus attempting "by indirection to reinstitute what was so long the age-65 mandatory retirement norm." *Id.* There is no persuasive evidence of "inducement," as opposed to "incentive," in the record before the court in the instant case to indicate that defendants intended their plan to operate as a substitute for involuntary retirement. Moreover, *Karlen* is factually distinguishable on the basis that the plaintiffs in that case were offered, and declined, the early retirement benefits and then brought suit claiming that they were, in effect, being punished for their decision. In the instant case, the plaintiffs' challenge is based on the fact that they were never given the opportunity to participate in the plan since they were both over 60 years old at the time the plan was first offered. Finally, and not insignificantly, the *Karlen* court's apparent adoption of the "equal benefit or equal cost" approach was reached without the benefit of the views presented to this court by the EEOC and the AARP.

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[12] The court in *Karlen* distinguished the holding in *Henn*, 819 F.2d 824, on the basis that the plan at issue in *Henn* offered a severance bonus to all employees over age 55 if they elected to retire within two months after the offer was made. Similarly, the plan at issue here in effect offers an incentive to all employees (except plaintiffs) over the age of 55, but gives those employees five years (rather than two months) to accept the incentive and retire early.

[5] Accordingly, the court now finds that plaintiffs have not met their summary judgment burden with respect to the general invalidity of defendants' early retirement plan under the ADEA and its interpretive regulations. Aside from the question of the plan's application to plaintiffs, defendants have sufficiently discharged their burden of demonstrating that no genuine issue of material fact exists as to whether they had legitimate business reasons for structuring the incentive plan the way they did. Accordingly, plaintiffs' motion for summary judgment declaring defendants' plan unlawful as a general matter is denied, and defendants' cross-motion for summary judgment with respect to the general validity of its voluntary early retirement incentive plan is granted.

[6] The crucial problem remains, however, that the individual plaintiffs were never given the opportunity to retire "under the plan" since they were both beyond the age–60 limitation at the time the cash incentive was first offered. *See* Item 52, pp. 5–6. Therefore, it cannot be said that the plan was "truly voluntary" with respect to plaintiffs. Further, it cannot be disputed that the defendants neither provided any incentive benefits nor incurred any costs for such benefits on behalf of plaintiffs. Thus, the only basis for denying plaintiffs' participation in the incentive plan was the fact that plaintiffs were over age 60, and "would be retiring anyway." Item 39, p. 97. Since the critical element of "voluntariness" was not satisfied, and since the fact that plaintiffs would eventually retire at some point in their careers is not the type of legitimate business reason contemplated by the Second Circuit in its remand order, plaintiffs were thus arbitrarily discriminated against solely because of their age in violation of the ADEA, and none of the reasons given by defendants and discussed above, economic or otherwise, are sufficient to establish a § 4(f)(2) defense to that discrimination.[13] The court's review of the summary judgment record before it, therefore, indicates that defendants' retirement incentive plan was adopted as a subterfuge to evade the purposes of the ADEA with respect to plaintiffs Sarah M. Cipriano and Jeune M. Miller.

[7] Moreover, the depositions, answers to interrogatories, and affidavits submitted indicate that defendants' discriminatory conduct toward plaintiffs was "willful" since defendants " 'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.' " *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 128, 105 S.Ct. 613, 625, 83 L.Ed.2d 523 (1985) (quoting *Airline Pilots Ass'n v. Trans World Airlines,* 713 F.2d 940, 956 (2d Cir.1983)). The undisputed facts show that, while concerns as to the discriminatory effect of the age–60 limitation were raised by the Union during the negotiations that resulted in the adoption of the challenged plan, attorneys for the Union and the Board did not conduct any investigation into the ADEA implications, or other potential legal ramifications, of the plan. *See* Plaintiffs' Statement of Material Facts (Item 46), ¶¶ 16–19. Furthermore, defendants' negotiators rejected a proposed "grandfather clause" which would have provided a one-year "window" period during which teachers who were already over age 60 could have voluntarily participated in the plan. *Id.; see also* Exh. I, p. 3, ¶ 3, attached to Item 46. Under these circumstances, any violation stemming from the defendants' adoption of the plan is clearly the result of a deliberate and willful, as opposed to merely unknowing or negligent, act on the part of defendants.

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[13] With regard to the Union's argument that the ADEA does not apply to the provisions of a lawfully negotiated collective bargaining agreement (*see* Item 53, pp. 34–35), the Supreme Court has held that employers and unions cannot bargain away employees' rights to be free from employment discrimination. *Alexander v. Gardner–Denver Co.,* 415 U.S. 36, 51–52, 94 S.Ct. 1011, 1021–22, 39 L.Ed.2d 147 (1974). While *Alexander* was decided under Title VII, the holding of that case has been extended to actions under the ADEA as well. *See U.S.E.E.O.C. v. County of Calumet,* 686 F.2d 1249, 1256 (7th Cir.1982).

The Union argues that further factfinding is required before a determination of willfulness can be made. Item 53, p. 23. According to the Union, its chief negotiator expressed his concerns over the legality of the incentive plan, but was limited in the extent of his bargaining power not only by the "take it or leave it" approach presented by the Board but also by New York State law. *Id.*, pp. 23–24. The Union further argues that it conducted negotiations within the framework of age discrimination law as it existed at the time, since the prevailing legal opinion in 1980 was that the type of plan at issue was not a violation of the ADEA. *Id.*, pp. 24–28.

These arguments do not change the fact, sufficiently demonstrated by the record, that defendants (as represented by their collective bargaining agents) had knowledge of the plan's potential discriminatory effect on plaintiffs. The pressures faced by the Union's negotiator, statutory or otherwise, were not unlike those faced by all participants in the collective bargaining process, and the record does not indicate the existence of any special factors which might require a different result here. The Union knew that its actions might have ADEA ramifications, but adopted the plan anyway. It could have conducted a legal investigation long before negotiations ever began in an attempt to structure a plan which would have provided for proper treatment of the two plaintiffs. Furthermore, regardless of the overall validity of the plan in the context of existing ADEA law, the result is inescapable that the plan denied Ms. Cipriano and Ms. Miller the same retirement incentive that was offered to younger teachers solely because those individuals were over the age of 60. The plan thus discriminated against plaintiffs in violation of the ADEA and, as discussed above, no legitimate business reason has been demonstrated to bring the plan within the protection of § 4(f)(2).

The two cases cited by the Union in support of its "willfulness" argument do not require a different result. The "plan" upheld by the court in *Mason v. Lister*, 562 F.2d 343 (5th Cir.1977), was actually a statutory provision that allowed all federal employees with over 25 years of service, or over 50 years old and with over 20 years of service, to voluntarily retire during a "reduction in force" [RIF] period in return for an annuity.[14] The early retirement provision did not have a maximum cutoff age, and thus the court was not faced with the question of whether excluding certain employees because of their age is permissible under the ADEA. The other case, *Patterson v. Independent School District No. 709*, 742 F.2d 465 (8th Cir.1984), similarly offered an early retirement incentive to all employees, albeit on a sliding scale. The plan at issue in *Patterson* was provided by a Minnesota state statute which held out a "carrot" of $10,000 for early retirement at age 55, reduced by $500 for each year over age 55 until 60, and by $1,500 for each year over age 60. *Id.* at 467–68. In the instant case, no "carrot" at all was ever offered to plaintiffs for the sole reason that they were over the maximum cutoff age at the time the plan was adopted.

Plaintiffs have thus met their summary judgment burden establishing that defendants' conduct with respect to plaintiffs amounted to knowing or reckless disregard of the ADEA's prohibition against age-based employment discrimination, and plaintiffs are thus entitled to liquidated damages pursuant to 29 U.S.C. § 626(b).

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[14] The statute provided, in relevant part:

> An employee who is separated from the service ... voluntarily, during a period when the agency in which he is employed is undergoing a major reduction in force, ... after completing 25 years of service or after becoming 50 years of age and completing 20 years of service is entitled to an annuity.

5 U.S.C. § 8336(d)(2) (1977 Supp.), *quoted in* 562 F.2d at 345.

Under the caselaw in the Second Circuit interpreting the remedies available under the ADEA, monetary damages, including liquidated damages and back pay, are not recoverable against a labor union. *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 957 (2d Cir.1983), *reversed on other grounds sub nom. TWA v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). Therefore, injunctive relief is the only relief available against the union, and the court has today entered summary judgment against plaintiffs on their request for injunctive relief. Accordingly, there being no cause of action left against the Union upon which relief may be granted, plaintiffs' complaint against the Union is dismissed in all respects.

Having so held, the court need not reach the statute of limitations and estoppel questions raised by the Union in its cross-motion for summary judgment and in its motion to amend its answer.

Conclusion

Accordingly, plaintiffs' motion for summary judgment is denied with respect to its request for injunctive relief. Defendants' cross motions for summary judgment are granted with respect to the general validity of their early retirement incentive plan as it currently stands. The union's motion for summary judgment dismissing the complaint against it is granted for the reasons set forth above. Defendants' motions are denied in all other respects. Plaintiffs' motion for summary judgment is granted with respect to the application of defendants' early retirement plan as to them.

Plaintiffs are directed to prepare a proposed judgment and present it to the court for settlement on December 15, 1988, at 9 a.m. The parties are directed to attempt to settle on an appropriate amount for attorneys' fees. If this cannot be done, plaintiffs shall file an affidavit in support of their application by December 15.

So ordered.

BUSINESS TRENDS ANALYSTS, INC., Plaintiff,

v.

The FREEDONIA GROUP, INC. and the Freedonia Group, Incorporated, Defendants.

No. 86 Civ. 3540 (KC).

United States District Court,
S.D. New York.

Oct. 19, 1988.

As Corrected Oct. 27, 1988.

Opinion On Motion to Amend
Dec. 27, 1988.

Exclusive licensee of copyrighted report on robotics industry brought action against competitor for copyright infringement, violation of Lanham Act, and violation of state unfair competition and trade secret law. The District Court, Conboy, J., held that: (1) competitor infringed copyright; (2) although licensee was entitled to recover $55,500 in lost profits, it failed to establish entitlement to actual damages suffered in its business as result of infringement; (3) competitor did not infringe on licensor's trademark; and (4) licensee could not prevail on unfair competition or trade secret claims. On motion to amend, the Court further held that: (1) "profits" could include noncash benefits received by competitor; (2) damages award would be offset by portion of competitor's employees' salaries; and (3) apportionment of profits between infringing and noninfringing elements was not justified.

Ordered accordingly.

1. Copyrights and Intellectual Property 🔑83(4)

Evidence adduced by exclusive licensee of copyrighted report on robotics industry was sufficient to establish that substantial similarities existed between copyrighted re-

Mr. **Shanor**. Our basic view is that that issue ought to be left open, not closed, because of the cost justification language.

Ms. **Silberman**. Senator, to further answer your question, it is the only issue that we have come up with in which cost justification we think is not appropriate.

Mr. **Shanor**. And we are willing to try to provide language that would let an organization that thought we were wrong in the sense of saying a particular program was lawful have its opportunity in court to say this isn't consistent with the ADEA's purposes, or to let an employer argue in a case that we thought was unlawful that this one ought to be lawful as consistent with the ADEA's purposes.

It strikes us that there are enough variations of early retirement incentives, which are a relatively new beast in our economy, that we ought just not to close that door.

Senator **Heinz**. Thank you, Mr. Chairman.

Senator **Metzenbaum**. Senator Kassebaum.

Senator **Kassebaum**. Thank you, Mr. Chairman.

I was interested in what the EEOC would recommend in the way of addressing the early retirement. And I am pleased that you would consider sending some language and thoughts on that.

I guess beyond that I would just like to ask perhaps Mr. Shanor or Ms. Silberman: Justice Marshall, I believe, in his dissenting view in the case made some reference to the fact that as the law would be interpreted in his view, there could have been a broader business purpose beyond the equal cost, equal benefit. Am I correct in Justice Marshall's dissenting opinion?

Mr. **Shanor**. I do not believe that was the thrust of Justice Marshall's dissent.

Senator **Kassebaum**. Well, I don't know that it was the thrust of his dissent.

Mr. **Shanor**. Yes. There may have been a word or two that would have left some flexibility.

Senator **Kassebaum**. But that as he viewed the law, there could have been an opportunity for a broader justification beyond equal cost, equal benefit. I guess what I am asking you is do you think that if there was any way to design a somewhat broader justification, that that would help solve some of the problems?

Mr. **Shanor**. That is a very tough question, Senator. My own belief, having worked with this problem for the 2½ years I have been with the agency, is that equal cost does take care of every kind of benefit program of which we are aware, and we see a lot of different kinds of benefit programs, other than the early retirement incentive issue. And so it strikes us that while there needs to be some additional flexibility for early retirement incentives, that that doesn't appear to be warranted with respect to any other kind of benefit.

Ms. **Silberman**. I think that it would be possible to have a different standard. This is the standard that we have used. It has generally worked. We have had few problems with it.

And it was our understanding, after having talked to the people up on the Hill that were drafting this bill, that this seemed to be the quickest and, for our purposes, for purposes of these cases and charges, speed really is of the essence. We don't want anything done that is going to foreclose valuable options. On the other hand, there will be valuable options foreclosed if this bill doesn't get passed. And therefore, that is why we went with the equal cost principle, because it was longstanding, generally workable, and even when we asked we did not get a lot of complaints about it.

Senator **Kassebaum**. Thank you, Mr. Chairman.

I thank the witnesses.

Senator **Metzenbaum**. The Chair wishes to point out we have eight more witnesses.

Senator Jeffords.

Senator **Jeffords**. I have some questions which I will submit, Mr. Chairman, on integration and actuarial assumptions. And I will pass at this point.

Senator **Metzenbaum**. Senator Cohen.

Senator **Cohen**. I will do likewise, Mr. Chairman.

Senator **Metzenbaum**. Thank you.

I have one last question, two last questions I want to ask Mr. Shanor.

Senator **Cohen**. Well, if that is the case, perhaps I should ask my questions. [Laughter.]

Senator **Metzenbaum**. They will be very brief.

Generally what position, Mr. Shanor, has EEOC taken regarding the possibility that severance pay and pension plans can be part of a single benefit package?

Mr. **Shanor**. Well, for a complete—and the most complete statement that we have ever made on this issue, we would refer to the *Albenante v. Fulflex* brief—but in brief we have said that severance pay is a short-term fringe benefit and that is very different from the long-term vested pension benefits that employees accrue over a lifetime and that you should not put those two together because they have such different purposes.

To make the point in as dramatic a way as I can, we have in essence said that those things are different and can't be lumped together as one integrated plan any more than you could say, well, we will hire women or we will hire blacks for certain kinds of jobs and we will pay them less but we will give them more time off.

Senator **Metzenbaum**. If you are inclined to elaborate on your answer, we would be glad to have it in writing.

The last question I will ask you is: Do you believe that S. 1511 is consistent with and supportive of your position opposing integration?

Mr. **Shanor**. Yes. It would in no way hurt our position concerning integration.

Senator **Metzenbaum**. Is it supportive of your position?

Mr. **Shanor**. We think so. We will certainly argue so.

Senator **Metzenbaum**. Thank you very much. I want to thank both Ms. Silberman and Mr. Shanor for your testimony.

Ms. **Silberman**. Senator Metzenbaum, I wanted to say on behalf of the EEOC how much we have enjoyed this.

Senator **Metzenbaum**. Thank you very much.

Ms. **Silberman**. The ability to work with you and the committee.

Senator **Metzenbaum**. We look forward to hearing from you with such supplemental comments as you care to make.

Our third panel is: Horace Deets, executive director of the AARP; Burton Fretz, executive director of the National Senior Citizens Law Center; Chris Mackaronis of Bell, Boyd & Lloyd of Washington; Kevin McCarthy, vice president of UNUM Life Insurance Company of Portland, ME; Mark Dichter of Morgan, Lewis & Bockius of Philadelphia; Fred Rumak, of the Association of Private Pension and Welfare Plans, Washington; James Short, ERISA Industry Committee, of Washington; and Douglas McDowell of McGuiness & Williams, of Washington.

I might say to all of the witnesses that your full statements, both those who have previously testified as well as those who are about to testify, will be included in the record. And I want to say on behalf of the committee that this committee has an evaluative judgment system, that we believe that the shorter the statement the more effective it is upon our thinking processes.

Senator COHEN. That does not apply to Senators, however, as you have noticed. [Laughter.]

Senator METZENBAUM. No. That has nothing to do with Senators.

Our first witness is Horace Deets. The Chair will impose a 5-minute rule and will be very strict with respect to that 5-minute rule. The light will go on, a yellow light at 4 minutes and at 5 minutes we will cut you off.

Mr. Horace Deets, we are happy to hear from you, sir.

STATEMENTS OF HORACE B. DEETS, EXECUTIVE DIRECTOR, AMERICAN ASSOCIATION OF RETIRED PERSONS, WASHINGTON, DC; FRED RUMAK, ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, WASHINGTON, DC; BURTON D. FRETZ, EXECUTIVE DIRECTOR, NATIONAL SENIOR CITIZENS LAW CENTER, WASHINGTON, DC; MARK DICHTER, MORGAN, LEWIS AND BOCKIUS, PHILADELPHIA, PA; CHRIS MACKARONIS, BELL, BOYD AND LLOYD, WASHINGTON, DC; JAMES D. SHORT, ERISA INDUSTRY COMMITTEE, WASHINGTON, DC; KEVIN MCCARTHY, VICE PRESIDENT, UNUM LIFE INSURANCE COMPANY, PORTLAND, ME; AND DOUGLAS S. MCDOWELL, ESQ., MCGUINESS AND WILLIAMS, WASHINGTON, DC

Mr. DEETS. Thank you, Mr. Chairman.

Members of the committee, I am Horace Deets, executive director of the American Association of Retired Persons, and I want to thank you for this opportunity to express AARP's strong support for legislation to restore the rights of older workers to fair treatment and employee benefits.

I urge Congress to swiftly enact the Older Workers Benefit Protection Act to ensure that older workers are not left unprotected.

Ten million of our 31 million members work full-time or part-time. Most are protected by the Age Discrimination in Employment Act, and until the Supreme Court's decision in *Betts* this meant that employers could not arbitrarily reduce or deny benefits to our members or to other older workers.

The ADEA has never required that employers provide benefits of absolutely equal value regardless of age or cost. AARP has never taken the position that the law does or should impose such a requirement.

Instead, because the cost of some benefits increases with the age of the employee—for example, life insurance or disability insurance—the ADEA has permitted employers to reduce the amount of these benefits for older workers. An employer was required only to spend the same amount of money to provide the benefit for an older worker as for a younger worker.

For example, if the employer spent $100 a month for life insurance for each employee, his conduct was legal even if the older worker received a smaller life insurance benefit.

This is the equal benefit or equal cost principle that has worked well for more than 20 years. *Betts* overturned 20 years of settled law and ignored legislative history clearly expressing Congress' support for the equal benefit or equal cost rule. Employers are now free to discriminate against older workers in almost all employee benefits.

Today I would just like to touch on four issues: first, what *Betts* means for older workers; second, the right of older workers to severance pay on the same basis as younger workers; third, whether the Older Workers Benefit Protection Act changes prior law on early retirement and exit incentive programs; and fourth, preserving the rights of workers whose pending discrimination cases may be dismissed because of *Betts*.

What does *Betts* mean for older workers? It means that they can be denied some of the most valuable aspects of employment and compensation, benefits such as health insurance, life insurance, disability insurance, severance pay, sick leave. After *Betts*, virtually every other benefit other than pensions is up for grabs.

On average, the benefits constitute between 25 and 40 percent of overall compensation. Thus *Betts* means that the real compensation of older workers can be arbitrarily cut as they are forced to individually purchase these benefits. *Betts* also contradicts the ADEA specific goal of promoting employment of older workers. The loss of benefits will discourage many older workers from remaining in the labor force, resulting in increased burdens on Social Security and on Medicare.

Some employers argue that the bill will dramatically change the law and force them to change their benefits plans. We, in concert with earlier testimony, feel this is untrue. The Older Workers Benefit Protection Act simply restores longstanding interpretations of the law. It makes no changes in prior law and will require no changes in the benefit plans of employers who were previously complying with the law.

A closer look at the arguments made by opponents of the bill reveals that they want to use this as an opportunity to change prior law and legalize certain discriminatory practices that were illegal prior to *Betts*. One of these practices has been the focus of much debate; that is, denying or reducing severance pay to older workers who are eligible for pensions.

The administration, the regulations, the Congress and the decisions of every appellate court that has addressed this issue have said that this practice is illegal. Severance pay and pension benefits are fundamentally different and may not be offset against each other. Employers who have offset severance pay against pension benefits have usually lost in the court because the regulations expressly prohibited offsetting any benefit, including severance, against the value of a pension.

The denial of the severance not only costs the older worker the value of the severance but may force him to accept a significantly reduced pension benefit if he must take early retirement, such as in the case of Mr. Sousa.

In contrast, a younger worker receiving severance will still receive 100 percent of his vested benefit from that employer when he retires. Severance is not a windfall for older workers any more than it is for younger workers; it is a benefit.

Another issue being debated is whether or not the bill would change prior law. Our answer is no. I would like to make our position on this very clear: We do not oppose early retirement and exit incentive programs, and we do not believe that all of these programs violate the ADEA. They can be beneficial for employees as well as for employers. Like in anything else, they must comply with the law.

Prior law did not prohibit and the benefit protection act will not prohibit early retirement or exit incentives.

Mr. Chairman, in the interest of time, I would like to make one concluding comment here: we think it is important to preserve the rights of older workers who have already filed benefit discrimination cases that may be dismissed because of *Betts*.

This bill reflects Congress' belief that *Betts* was wrongly decided. It restores the prior law and its longstanding, well-known interpretation, and we would encourage quick action in this regard.

[The prepared statement of Mr. Deets (with attachments) follows:]

PREPARED STATEMENT OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS
HORACE B. DEETS, EXECUTIVE DIRECTOR

Mr. Chairman and Members of the Committee,

I am Horace Deets, Executive Director of the American Association of Retired Persons. Thank you for this opportunity to express A.A.R.P.'s strong support for legislation that would restore the rights of older workers to fair treatment in employee benefits. I urge Congress to swiftly enact the Older Workers' Benefit Protection Act to insure that workers are not left unprotected.

Ten million of A.A.R.P.'s 31 million members work full- or part-time. Like most workers above the age of 40, most of A.A.R.P.'s working members are protected by the Age Discrimination in Employment Act (A.D.E.A.). Since its passage in 1967, the A.D.E.A. has prohibited employers from arbitrarily reducing or denying benefits to older workers. The only exception to this rule was that an employer could provide a smaller amount of a benefit to older workers if --

- the employer's cost for providing the benefit increased with an employee's age, and
- the employer spent at least as much money to provide the benefit for an older worker as for a younger worker.

The purpose of this exception was to make sure that it did not cost employers more to employ older workers because of the age-related increased cost of certain benefits.

This rule, and its exception, have been known as the "equal benefit or equal cost" principle. For more than 20 years, since the A.D.E.A.'s inception, this was the only standard for determining whether an employer was discriminating in employee benefits. Cost was the only acceptable basis for unequal benefits; any other criteria would be arbitrary.

The Supreme Court's opinion in Ohio v. Betts changed all this. Betts gives employers the freedom to discriminate in almost all employee benefits for the first time in more than 20 years. This contradicts Congress' clear intentions when enacting the A.D.E.A. in 1967, and when amending the benefits provisions in 1978, 1982 and 1986.

I would like to address four issues today:

- FIRST, what Betts means for older workers;
- SECOND, the right of older workers to receive severance pay on the same basis as younger workers;
- THIRD, the effect of the Older Workers' Benefit Protection Act on prior law regarding early retirement and exit incentive programs; and
- FOURTH, preserving the rights of workers who have pending claims of benefits discrimination that may be dismissed because of Betts.

What does Betts mean for older workers? It means that they can be denied some of the most valuable aspects of employment and compensation: benefits such as health, life and disability insurance, severance pay, sick leave - after Betts, virtually every benefit other than pensions is up for grabs. On average, benefits constitute between 25% and 40% of overall compensation. In fact, are considered a form of compensation under federal pension law (ERISA) and other employment discrimination laws, such as Title VII (which prohibits discrimination on the basis of race or sex).

Betts means that older workers can arbitrarily be denied these benefits of employment. It means that the "real" compensation of older workers can arbitrarily be cut as they are forced to individually purchase health, life, disability and other types of insurance and benefits.

Betts also contradicts an express purpose of the A.D.E.A. - to promote the employment of older workers. Obviously, the loss of benefits will discourage many older Americans from remaining in the labor force. And, employers may use benefit reductions or denials as a way to coerce older workers to leave (even though this remains illegal). This policy would drive much-needed older workers out of the work force and may, correspondingly, increase the burdens on Social Security and Medicare as older persons retire earlier than anticipated.

The Older Workers' Benefit Protection Act will restore the A.D.E.A.'s prohibition against discrimination in employee benefits and the "equal benefit or equal cost" exception to that rule. No changes in prior law, whether beneficial or detrimental to older workers or employers, are made by this bill.

Employers who previously complied with the law will not be required to changes their business practices with regard to employee benefits. UNUM, the largest long-term disability insurer in the United States, agrees that the bill will not require any changes from pre-Betts practices with regard to insurance benefits.

Nonetheless, some employers argue that the bill dramatically changes the law. A closer look at their arguments, however, makes it clear that the employers who oppose this bill are, in fact, trying to use Betts and this bill to change prior law to legalize certain discriminatory practices that were illegal prior to Betts.

One discriminatory practice that has been the focus of much debate -- and which was clearly prohibited prior to Betts -- is the denial or reduction of severance benefits to older workers simply because they are eligible for a pension benefit. A.A.R.P. agrees with the Administration, with the regulations, with the Congress and with the decisions of virtually every court that has addressed this issue: severance and pension benefits are fundamentally different and may not be offset against each other. This must not be changed.

Severance pay is not a "windfall" for older workers any more than it is for younger workers. In fact, the denial of severance would not only cost the older worker the value of the severance, but may force him to accept a significantly diminished pension benefit if he must take early retirement.

A younger worker receiving severance will still receive 100% of his vested pension benefit when he reaches normal retirement age. His pension benefit will not -- and cannot -- be reduced by the amount of any severance pay he may previously have received from the same employer. In contrast, an older worker with the same salary and years of service, would receive substantially less in total benefits simply because he was old enough to receive his pension now, rather than having to wait to become eligible. This is age discrimination in its purest form. And, employers who have offset severance against pension benefits have usually lost in court.

Denying older workers severance pay is no less discriminatory than denying them health insurance or life insurance or any other benefit provided to younger workers. Severance is like all these benefits, in that it is provided or withdrawn solely at the will of the employer. However, severance is fundamentally different from pension benefits. Once an employee performs the required service, pension benefits are an earned and vested benefit to which the employee is legally entitled.

The regulations expressly prohibited offsetting the value of any other benefit (including severance) against the value of a pension benefit. Because pension values are significantly greater than those assigned to other benefits, and because - again, unlike other benefits - pension values increase with age, permitting the offsets against the value of a pension benefit could result in older workers getting no other benefits at all.

Another issue that has been the subject of debate is whether the prior law regarding early retirement and exit incentive programs is changed by this legislation. Our view is that the answer is "no." This legislation will not prohibit early retirement or exit incentives; nor will it impose greater burdens upon employers to justify these programs under the A.D.E.A. than was required under the law prior to Betts.

I would like to make A.A.R.P.'s position on this issue very clear: A.A.R.P. does not oppose early retirement and exit incentive programs. A.A.R.P. does not believe that all these programs violate the A.D.E.A. We recognize that such programs can be beneficial for employees as well as employers. However, like every other business practice, these programs must comply with the non-discrimination laws.

There is a wide range of early retirement incentives that would remain legal under the A.D.E.A. if this bill were passed. For example, a voluntary exit incentive offered to all employees, or to all employees with a minimum number of years of service; or a voluntary early retirement supplement offered to all employees above a certain age, would continue to be legal.

These programs all satisfy the "equal benefit or equal cost" rule because the benefit offered is not reduced or eliminated as the employee gets older. For example, an early retirement supplement of $100/month that offered to all employees above age 55 means that everyone above age 55 will be getting the exactly the same monthly benefit. And, the only limitation on the total benefit an employee receives over time is the employee's death. In contrast, a $1,000 exit incentive that is offered only to employees between ages 55-60 means that a 61 year old employee is not receiving a benefit he would have received if he were younger.

AARP therefore has expressed doubt about the legality of exit or early retirement incentive programs that:

- are denied to older workers, such as the one described above; or
- mask an effort to force older workers out of the labor force. For example, in some recent cases, exit incentives were ostensibly offered to all employees but, in reality, only older workers were encouraged - even coerced - into leaving.

The Older Workers' Benefit Protection Act would not change the standard by which the legality of these two types of benefits programs have been judged: the same "equal benefit or equal cost" principle that is applied to all other benefits. There is no basis or reason for not applying this principle to benefits offered in an early retirement or exit incentive program.

Astonishingly, however, the E.E.O.C. has tried to expand the ability of employers to offer discriminatory early retirement programs that cannot be justified under the "equal benefit or equal cost" principle. It has done this not by issuing a proposed or new rule or by taking any of the steps required for making major policy changes. Instead, it has relied upon a single "friend of the court" brief filed with the district court in Cipriano v. Bd. of Education of No. Tonowanda.

In that brief, the E.E.O.C. argued for the first time that, in certain very limited circumstances, a voluntary early retirement incentive denied to older workers can be legal even if the employer can provide no more than a speculative and unprovable "legitimate business reason" for the discrimination.

Even if it were acceptable or legal for the Commission to make such major changes in its policy by simply filing a brief - which it is not - this particular brief cannot be read as such a change. The court in Cipriano found that the commission's arguments weren't even relevant to the plaintiffs' claims of discrimination. The plaintiffs not only won the case, but won double damages because their employer was found to have "wilfully" violated the law. The incentive in that case was a $10,000 benefit given to anyone between the ages of 55-60 who left employment. The plaintiffs were older than 60 and were therefore denied the benefit.

Finally, I want to stress the importance of preserving the rights of older workers who had cases pending on the day Betts was decided, or who filed their cases after that date. This bill expresses Congress' belief that Betts was wrongly decided. It restores the prior law and its long-standing, well-known interpretation. If you permit employers who were violating the law prior to Betts to escape liability because of Betts, you will be rewarding those who have been discriminating the longest. By the same token, it is only fair that workers who may be victims of discrimination not be penalized by an accident of timing.

Thank you for this opportunity to discuss this important issue with you. I will be pleased to answer any questions.

AARP NEWS

For further inquiry, contact American Association of Retired Persons • Office of Communications
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FOR IMMEDIATE RELEASE
September 27, 1989

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PROTECT OLDER WORKERS FROM ARBITRARY BENEFITS CHANGES, AARP DIRECTOR URGES HOUSE COMMITTEES AT HEARING

WASHINGTON, D.C. -- The American Association of Retired Persons (AARP) strongly supports legislation that would prevent employers from discriminating against older workers in employee benefits, AARP Executive Director Horace Deets said today in Congressional testimony.

Deets testified at a hearing held jointly by the Senate Special Committee on Aging and the Labor and Human Resources Subcommittee on Labor.

The hearing focused on legislative efforts to reverse a 1989 U.S. Supreme Court decision in Public Employees Retirement Systems of Ohio vs. Betts. The Betts ruling permits employers to discriminate in employee benefits for the first time since Congress enacted the Age Discrimination Employment Act (ADEA) in 1967.

"On average, benefits constitute between 25 percent and 40 percent of an employee's overall compensation. The Betts case means that older workers can arbitrarily be denied these benefits of employment. It means that the 'real' compensation of older workers can be cut as they are forced to individually purchase health, life, disability and other types of insurance and benefits," Deets said.

He restated AARP's endorsement of the proposed "Older Workers, Benefit Protection Act" (S. 1511 and H.R. 3200), which makes clear that the ADEA bars employers from discriminating against older workers in the amount and types of benefits they provide.

Deets said the ADEA has always prohibited employers from arbitrarily reducing or denying benefits to older workers. The only exception from this rule was based on the principle of "equal benefit or equal cost." This standard allowed an employer to provide a smaller amount of a benefit to older workers if (1) the employer's cost for providing the benefit increased with an employee's age; and (2) if the employer spent as least as much money to provide the benefit for an older worker as for a younger worker.

One-third of AARP's members work full-time or part-time.

AARP is the nation's largest organization of Americans 50 and older. The nonprofit, nonpartisan organiztion offers a wide range of membership benefits, legislative advocacy at the federal and state levels, and educational and community service programs offered through a network of volunteers.

# # # #

AARP

Facts about

THE OLDER WORKERS' BENEFIT PROTECTION ACT

(S. 1511 / H.R. 3200)

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I. THE LAW PRIOR TO BETTS: THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA") AND EMPLOYEE BENEFITS

Q: DID CONGRESS INTEND TO PROHIBIT AGE DISCRIMINATION IN EMPLOYEE BENEFITS?

A: YES! The ADEA, passed in 1967, protects workers above the age of 40 and older (who work for employers with 20 or more employees) from age discrimination in all "compensation, terms, conditions or privileges of employment." The legislative history of the ADEA - both in 1967 and in the 1978 and 1982 amendments - makes clear that Congress intended that the ADEA apply to employee benefits.

Prior to the Supreme Court's decision in Public Employee Retirement System of Ohio v. Betts on June 23, 1989, the courts and the Equal Employment Opportunity Commission uniformly interpreted the ADEA as prohibiting discrimination in employee benefits for older workers.

Q: DID CONGRESS INTEND FOR OLDER WORKERS TO GET ABSOLUTELY EQUAL AMOUNTS OF EACH BENEFIT COMPARED TO YOUNGER WORKERS, REGARDLESS OF COST TO THE EMPLOYER?

A: **NO! The ADEA requires only that an employer spend equal amounts of money to provide a particular benefit for an older worker and a younger worker, even if the older worker gets less of the benefit.** This concept, known as the "equal benefit or equal cost rule," is embodied in section 4(f)(2) of the ADEA. (See discussion of ADEA sec. 4(f)(2) below.)

Congress recognized that **the cost of certain benefits increase with the age of the employee.** For example, it may cost an employer more money to buy a $10,000 life insurance policy for a 60-year-old worker than for a 25-year-old worker.

Therefore, Congress was concerned that, if the ADEA required absolutely equal amounts of these benefits, employers might be discouraged from hiring older workers because it would cost the employers more to provide benefits for them. The "equal benefit or equal cost" rule solved this problem.

Q: WHAT IS "SECTION 4(f)(2)" OF THE A.D.E.A.?

A: Section 4(f)(2) provides employers with a defense to an accusation of age discrimination in benefits. It states:

> It shall not be unlawful for an employer, employment agency, or labor organization - . . . to observe the terms of a . . . bona fide employee benefit plan . . .

> which is not a subterfuge to evade the purposes of this chapter . . .

The regulations interpreting sec. 4(f)(2), and settled case law, made clear that a plan was a "subterfuge" if an employer who provides a smaller or no benefit to older workers is unable to prove that his cost for providing the benefit is the same for an older worker as for a younger worker. Such a plan violates the ADEA. This was the gist of the "equal benefit or equal cost" rule.

Q: WHAT IS THE "EQUAL BENEFIT OR EQUAL COST" RULE?

A: The "equal benefit or equal cost" rule was the only justification permitted for reducing or denying a benefit to older workers. See Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988). This "affirmative defense" had to be raised by the employer in order to rebut an accusation of benefits discrimination.

The employer could prove **either**:

- the **amount of the benefit** provided to older and younger workers **was equal** (e.g., every worker got a $10,000 life insurance policy, regardless of age); or
- if the cost of a benefit increased with the employee's age, the **employer's cost for providing the benefit was equal** for all workers, regardless of age (e.g., the employer paid $25/month per employee for life insurance).

If the employer could prove either of these things, he was not violating the ADEA.

The "equal benefit or equal cost" rule was contained in regulations first issued by the Department of Labor in 1969. (DOL initially had jurisdiction for enforcing the ADEA.) In 1978, Congress amended ADEA sec. 4(f)(2) and, specifically approving of the "equal benefit or equal cost" rule, ordered DOL to issue expanded and clearer regulations. This was done in 1979. The EEOC formally adopted these regulations (codified at 29 C.F.R. sec. 1625.10) after it took over enforcement of the ADEA.

The "equal benefit or equal cost" defense has been the only defense successfully used by any employer to rebut an allegation of benefits discrimination - until Betts.

Q: WHY CAN'T EMPLOYERS RELY UPON ANY "BUSINESS REASON" TO FOR DISCRIMINATE IN EMPLOYEE BENEFITS?

Congress made clear that **any reason other than the cost of the benefit would be arbitrary.**

For example, it is unlawful to conduct a layoff in which only long-term employees are laid-off, since this criterion is merely a substitute for age - even though it may save the employer the most money. In another example, at one time employers were able to use pension plans as a way to force people to retire and argued that this was a "legitimate business purpose" for discriminating. Congress disagreed, and in 1978 outlawed this practice.

II. PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO V. BETTS, 109 S.Ct. 2854 (June 23, 1989)

Q: WHAT WERE THE FACTS IN OHIO V. BETTS?

A: The Ohio Public Employee Retirement System ("P.E.R.S.") permitted government workers under age 60 to retire with disability benefits, if eligible; workers above age 60 could retire only with normal retirement benefits. Mrs. Betts was a local government employee who became disabled with Alzheimer's syndrome and had to leave work at age 61. Solely because of her age, Mrs. Betts received only $158/month in retirement benefits, rather than the $350/month she would have received with disability retirement.

Mrs. Betts sued in federal court, alleging age-based benefits discrimination. Because P.E.R.S. could not justify its plan under the "equal benefit or equal cost" rule, the district and appellate courts ruled for Mrs. Betts. P.E.R.S. appealed to the U.S. Supreme Court.

Q: WHAT DID THE SUPREME COURT DECIDE?

A: The Supreme Court reversed the lower courts and threw out 20 years of settled law. It invalidated the "equal benefit or equal cost" rule and rejected the arguments of the Administration and the decisions of every Court of Appeals that has reviewed the rule and found it valid.

The Supreme Court ruled:

1) **The ADEA does not protect older workers from age discrimination in employee benefit plans.** The ADEA only prohibits employers from discriminating in benefit plans when the employer's intention is to discriminate in some other, non-benefit aspect of employment, e.g., to pay older workers lower wages.

2) **The "equal benefit or equal cost" defense is invalid because it is not found in the language of the statute.** Instead, the employee now has the burden of proving that the employer intends to use a discriminatory benefit plan to discriminate in some other way, such as hiring, firing, or wages.

3) **The ADEA does not apply to benefit plans established prior to the passage of the ADEA.**

Q: HOW DOES BETTS CHANGE THE LAW?

A: Betts significantly changes the ADEA in a number of ways

harmful to older workers.

FIRST - For the first time since the ADEA was passed in 1967, employers can deny or reduce benefits to older workers for no reason other than the age of those workers. Justice Marshall, dissenting, said that, contrary to the express purpose of the ADEA, older workers can now legally be denied benefits based only on an employers "abject hostility to, or his unfounded stereotypes" of older workers.

SECOND - An employee's burden of proof in a benefits discrimination case has been so greatly increased that it will be almost impossible to prove that the employer is violating the law. As the Chair of the A.B.A. Section of Labor and Employment Law said, the practical effect of Betts is that benefit plans, no matter how age discriminatory, are immunized from liability under the ADEA.

THIRD - Betts will permit employers who have been discriminating the longest - those with benefit plans that pre-date the ADEA - to continue to discriminate with absolute immunity. The worst offenders are permitted to continue to discriminate.

III. THE EFFECT OF BETTS ON OLDER WORKERS' BENEFITS

Q: WHAT BENEFITS ARE AFFECTED BY BETTS?

A: Betts will permit employers to discriminate in **virtually all employee benefits**, such as health insurance, disability, sick leave, life insurance, and vacations. Betts will also permit discrimination in benefits such as severance pay and early retirement incentives.

Q: WHAT BENEFITS ARE NOT AFFECTED BY BETTS?

A: The only benefits not affected by Betts - in which employers still may not discriminate based on age - are pension benefits and health insurance for workers older than 65.

Pension benefits: In 1986, Congress amended the ADEA to add section 4(i), which specifically prohibits employers from reducing or stopping contributions and accruals to an employee's pension on the basis of that employee's age.

Health Benefits for Age 65+ Employees: In 1982 (and 1984), Congress amended the ADEA to add section 4(g), which requires employers to provide workers (and their spouses) eligible for Medicare (workers above age 65) with the same health insurance provided to younger workers. This was to insure that employers did not shift their costs for health insurance onto Medicare.

Q: COULD EMPLOYERS NOW DECIDE TO PROVIDE NO BENEFITS TO WORKERS OVER AGE 40?

A: YES!

Q: DO EMPLOYERS HAVE TO JUSTIFY A DECISION TO DENY OR REDUCE BENEFITS TO OLDER WORKERS?

A: NO!

IV. THE OLDER WORKERS' BENEFIT PROTECTION ACT (S.1511/H.R.3200)

Q: WHAT DOES THE OLDER WORKERS' BENEFIT PROTECTION ACT DO?

A: The Benefit Protection Act would **reverse Betts and restore the law** to where it was on the day the decision was issued. The bill would:

- make clear that the ADEA prohibits age discrimination in employee benefits;
- reinstate the "equal benefit or equal cost" regulations;
- reinstate as the employer's burden to prove the sec. 4(f)(2) defense by proving "equal benefit or equal cost";
- make clear that benefit plans pre-dating the passage of the ADEA must still comply with the law; and
- apply to all lawsuits pending on or after the date that Betts was decided (June 23, 1989) so that no one is harmed by the incorrect decision of the Supreme Court.

Q: WILL THE BENEFIT PROTECTION ACT REQUIRE EMPLOYERS TO PROVIDE OLDER WORKERS WITH ABSOLUTELY EQUAL BENEFITS TO YOUNGER WORKERS?

A: NO! As before, employers may reduce the amount of a benefit for an older worker to the extent that the cost of the benefit increases with a worker's age.

Q: WILL THE BENEFIT PROTECTION ACT ALLOW "REVERSE DISCRIMINATION" SUITS BY YOUNGER WORKERS WHEN THE VALUE OF A BENEFIT INCREASES WITH AGE (e.g., pension benefits)?

A: NO! This could not happen, for a number of reasons:

First, the Benefit Protection Act does not say that the employer has to spend absolutely equal money for a benefit regardless of age; instead, it says only that the employer may not spend **less** for a benefit for an older worker:

> 2(B): ". . .where, for each benefit or benefit package . . . the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, . . .(emphasis supplied).

Thus, spending less for a benefit for a younger worker would not violate the Benefit Protection Act.

Second, "reverse discrimination" cases have never been successful or seriously contemplated under the ADEA.

Third, discrimination in pension benefits - which are the only benefits that normally increase in value with an employee's age - is dealt with in sec. 4(i) of the ADEA, which does not contemplate "reverse discrimination" cases.

Q: WILL THE BENEFIT PROTECTION ACT REQUIRE EMPLOYERS TO SPEND MORE MONEY ON EMPLOYEE BENEFITS FOR OLDER WORKERS?

A: NO! The Benefit Protection Act does not impose any new obligations or costs upon employers with regard to benefits for older workers. As before Betts, employers need only spend equal money per employee, regardless of age, to provide a particular benefit.

Q: WILL THE BENEFIT PROTECTION ACT REQUIRE EMPLOYERS TO MAKE ANY CHANGES IN THEIR EXISTING BENEFIT PLANS?

A: NO! Because the bill restores the law to where it was before Betts, employers will not need to make any changes in their benefit plans if they were previously complying with the ADEA.

Q: WHY DOES THE BENEFIT PROTECTION ACT APPLY TO CASES PENDING ON OR AFTER THE DATE THAT BETTS WAS DECIDED, RATHER THAN JUST TO CASES PENDING ON THE DATE THE NEW LAW TAKES EFFECT?

A: The "savings" clause preserves the rights of older workers who had benefits discrimination cases pending on the day Betts was decided, or who filed a case after that day. This will insure that no victim of illegal benefits discrimination is denied his or her rights solely because they had the misfortune to have a case pending at the time Betts was decided.

The Benefit Protection Act reflects Congress' belief that the ADEA has and continues to prohibit benefits discrimination. Nonetheless, until this bill is passed, Betts will provide a basis for dismissing many lawsuits alleging age discrimination in benefit plans that, under prior law and again under the Benefit Protection Act, would otherwise be good claims.

There is no unfairness to employers in preserving these cases. Employers have been operating for more than 20 years under the "equal benefit or equal cost" rule.

V. EARLY RETIREMENT INCENTIVES

Q: DOES A.A.R.P. BELIEVE THAT EARLY RETIREMENT INCENTIVE PROGRAMS ARE ILLEGAL, OR SHOULD BE PROHIBITED?

A: **NO! Early retirement programs are not per se illegal, nor should they be prohibited.** A.A.R.P. believes that early retirement incentive programs, exit incentive programs and other enhanced benefit downsizing programs can be beneficial to employers and employees. However, like every employment practice, these programs must comply with the ADEA and other labor laws.

Q: WILL THE BENEFIT PROTECTION ACT PROHIBIT EMPLOYERS FROM OFFERING EARLY RETIREMENT INCENTIVES?

A: **NO! The Benefit Protection Act does not change the law on early retirement plans.** Under pre-*Betts* law, employers could and did offer many types of early retirement incentives, as well as other exit incentives. The Benefit Protection Act makes no changes in this regard.

Some cases have disputed the legality of *certain types* of early retirement or exit incentive plans.[*] However, the Benefit Protection Act does not change the law regarding these plans under the ADEA.

Q: WHAT TYPES OF EARLY RETIREMENT PLANS MAY EMPLOYERS OFFER?

A: **Many early retirement and exit incentives were and will continue to be legal under the ADEA.** For example:

- a permanent feature in a pension plan that lessens the "actuarial reduction" in benefits for vested employees who take early retirement between ages 55-60;
- a voluntary exit incentive offered on an equal basis to *all* employees;
- a voluntary early retirement or exit incentive offered to all employees above a certain age or with a minimum number of years of service.

This is, of course, not an exhaustive or exclusive list.

Q: WILL THE BENEFIT PROTECTION ACT MAKE IT HARDER FOR EMPLOYERS TO DEFEND AN EARLY RETIREMENT INCENTIVE PLAN AGAINST A CLAIM OF AGE DISCRIMINATION?

A: **NO!** As before, an employer will have to satisfy the "equal benefit or equal cost" rule in order to successfully rebut an accusation of age discrimination in an early retirement or exit incentive plan. (This sec. 4(f)(2) defense applies to early retirement and exit incentives because they are "employee benefit plans" under the ADEA.)

Q: WHAT DEFENSES OTHER THAN "EQUAL BENEFIT OR EQUAL COST" HAVE BEEN RAISED BY EMPLOYERS TO JUSTIFY DISCRIMINATION IN AN EARLY RETIREMENT PLAN?

A: As noted previously, the "equal benefit or equal cost" rule has been the only defense successfully used by any employer to escape liability under the ADEA for benefits discrimination (until Betts).

Employers have argued -- unsuccessfully -- that sec. 4(f)(2) permits other defenses. For example, some employers have argued that they should be permitted to reduce or deny a benefit to an older worker if the employer has a "legitimate business reason" for the discrimination. However, in every case where ~~this~~ "defense" has been raised, it was rejected or rule inapplicable. **Thus, no employer has escaped liability for benefits discrimination by arguing that he had a "legitimate business reason" other than "equal benefit or equal cost."**

Q: WHAT IS THE E.E.O.C.'s POSITION ON EARLY RETIREMENT INCENTIVES AND THE A.D.E.A.?

A: The E.E.O.C. has adopted and supported the "equal benefit or equal cost" rule in its regulatious and in numerous cases in the federal courts. In fact, the EEOC filed a brief with the Supreme Court in Betts in support of its regulations.

However, in one case, Cipriano v. Bd. of Ed. of No. Tonawanda, the EEOC departed from its well-established regulations to argue that, in certain very limited circumstances, an employer should be able to discriminate in an early retirement program for a "legitimate business purpose." This argument was made in only one district court brief, which was filed by the EEOC after being ordered by the Court of Appeals to participate in the case as a "friend of the court. Nonetheless, the district court refused to address the EEOC's argument, since it didn't apply to the facts in the case!

The novel and unsuccessful argument made by the EEOC in this one district court brief cannot be construed as the "policy" of the EEOC. The regulations remain the policy.

VI. SEVERANCE PAY FOR EMPLOYEES ELIGIBLE FOR A PENSION

Q: THE LAW PRIOR TO BETTS: COULD EMPLOYEES DENY SEVERANCE PAY TO PENSION-ELIGIBLE EMPLOYEES?

A: **NO! THE ADEA clearly prohibited the denial of severance pay to an employee just because the employee was eligible for a pension benefit.** EEOC policy, its regulations at 29 C.F.R. sec. 1625.10 (containing the "equal benefit or equal cost" rule), and the case law are in agreement that the denial of severance pay to pension-eligible employees is age discrimination.

Q: DOES THE BENEFIT PROTECTION ACT CHANGE PRIOR LAW IN THIS RESPECT?

A: **NO!**

Q: ISN'T RECEIVING A PENSION BENEFIT AND SEVERANCE PAY A WINDFALL FOR OLDER WORKERS?

A: **NO!** In fact, the opposite is true. **A younger worker receiving severance pay from an employer will still receive 100% of his vested pension benefit from that employer upon reaching retirement age.**

In contrast, the denial of severance pay to older workers not only costs them the value of the severance benefit, but very often **forces older workers to accept significantly diminished pension benefits.**

Pension benefits are generally reduced when an employee starts receiving his pension prior to reaching "normal retirement age" (usually age 65). This reduction in the monthly benefit, which can be very significant, reflects the expectation that a younger retiree will be receiving pension benefits for a longer period of time.

When an older worker is denied severance pay, he may be forced to accept the smaller monthly pension benefit in order to maintain an income stream while looking for a new job.

Q: WHY IS IT ILLEGAL TO DENY SEVERANCE PAY TO EMPLOYEES ELIGIBLE FOR PENSION BENEFITS?

A: There are many reasons why denying severance pay to employees eligible for a pension ~~is~~ violates the ADEA.

- **Severance pay and pension benefits are fundamentally different, and serve different purposes.** (This is discussed in more detail below.)
- **Pension eligibility is simply a proxy for age** (only older workers will be eligible for a pension) and therefore may not be used as a basis for denying an older worker **any** benefit.
- **An employer may not compare the value of any other benefit to an employee's pension or retirement benefit for the purpose of denying an older worker the other benefit**. If this would permitted, the value of an employee's pension - which increases with the age of the employee - would cancel out virtually every other benefit.

Pension benefits are different from all other benefits, and are treated as such in the law.

Q: HOW ARE SEVERANCE BENEFITS DIFFERENT FROM PENSION BENEFITS?

A: Severance pay and pension benefits serve fundamentally different purposes and are derived from fundamentally different sources.

Severance pay provides a limited amount of income when an employee is terminated. Its purpose is to help the employee for a short period of time to ease the employee's search for a new job. It is paid out of the employer's corporate assets and the decision of how much and when to offer severance pay is made solely by the employer. There is no contractual right to severance pay. However, like all other at-will benefits, if the employer chooses to provide it, it must be provided in a non-discriminatory fashion.

Pension benefits, in contrast, are designed to be a lifetime wage replacement for employees who, upon reaching a certain age, **make a voluntary decision to accept pension benefits in lieu of continued employment with that employer.** Unlike other benefits, **pension benefits are earned by the employee and, once vested, are a legal entitlement.**

Pension benefits are not paid out of the employer's corporate assets. Instead, the employer makes regular payments during the employee's career into a separately administered fund from which only pension benefits are paid. In many plans, employees also contribute a portion of their income to the pension fund.

Although employers are free to choose whether to provide a pension plan, federal law requires that once a plan is established the employer is obligated to pay benefits to employees in accordance with the terms of the plan.

Every employee who has vested in his or her pension benefit is entitled to receive 100% of that benefit upon reaching normal retirement age -- regardless of whether the employee previously received a severance benefit from the employer.

Footnotes:

1. AARP has expressed concern about two types of early retirement plans that may violate the ADEA:

- exit incentives offered only to older workers, particularly when participation is involuntary, e.g., coercing older workers into accepting early retirement; and
- one-time exit incentives offered only to younger workers and denied to older workers, e.g., offering an exit incentive only to employees age 55-60.

The Benefit Protection Act does not change current law on these issues.

2. In Cipriano, the plaintiffs had been denied a cash benefit upon retirement because they were too old. The school board limited such cash benefits to teachers who retired between ages 55-60. The employer could not satisfy the "equal benefit or equal cost" rule since the cost of providing a cash benefit is same for all employees, regardless of age. The EEOC argued that there might be some "legitimate business purpose" for this discrimination in a voluntary exit incentive program -- but was forced to concede that no such purpose existed in this case.

The court not only refused to address the EEOC's argument - stating that it was inapplicable to the facts (the plaintiffs had never had a change to "volunteer" to participate in the incentive program because of their age!) - but held that the defendant school board had "wilfully" violated the ADEA and ordered it to pay liquidated as well as compensatory damages.

Senator **Metzenbaum**. Thank you very much, Mr. Deets. I do appreciate your concluding promptly within our time constraints.

Mr. Fred Rumak, we are happy to have you with us, sir, representing the Association of Private Pension and Welfare Plans.

Mr. **Rumak**. Thank you. Good morning, Mr. Chairman, and members of the committee. I am Fred Rumak, director of tax and legal services of Buck Consultants, one of the oldest and largest employee benefit consulting firms in the country. My appearance is, however, on behalf of the Association of Private Pension and Welfare Plans.

The APPWP appreciates the opportunity to testify concerning S. 1511, because the organization is concerned that the bill, if enacted in its present form, would deal a devastating blow to a great many currently accepted and beneficial benefit arrangements and design practices, such as early retirement subsidies, Social Security supplements under defined benefit plans as well as early retirement windows and severance pay plans.

The bill would also prohibit benefit coordination and integration. These changes would adversely affect employees and employers.

In addition, the bill's retroactive effective date compounds the potential damage, as it would impose an entirely new law on longstanding arrangements.

In sum, the bill, as I will discuss, although intended merely to prevent discrimination based on age, would prevent the use of numerous legitimate plan design and coordination features and result in a lessening of the retirement and benefit security of all employees.

In my experience, it is clear that employers could not afford the additional costs that this bill would impose, and most would opt to reduce or even eliminate benefits, hurting both young and old employees alike.

In my testimony I will only highlight the major areas of concern and focus primarily on defined benefit pension programs where age-related criteria is a crucial element of plan design.

Prior to making my comments, though, I would like to say that the APPWP strongly believes that age discrimination should be prohibited and is ready and willing to work with the committee to help it fashion a bill which is equitable for all.

First, I think it's important to remember that in considering the effects of the bill on employer-sponsored retirement programs, one must recognize that defined benefit pension plans are generally designed and do favor older employees insofar as it generally costs employers more to provide these benefits to these employees than to younger employees. This, in part, is to reward long-service employees.

Also, in determining what benefits an employer may offer to employees, the employer always looks at the total cost of the benefit package. Rational programs take into account all benefits employees are entitled during their career and after retirement, thereby providing the maximum level of benefits to the widest range of employees at the least cost.

If new legislation upsets the balance between benefit coverage and the limited resources, older workers may in fact suffer as dollars provided to increase certain benefits are taken away from other programs providing other benefits to them and others.

An example: Many employers use a substantial portion of their benefit dollars to provide defined benefit plans. Most of these plans often include early retirement provisions that typically are made available to employees over age 54.

These provisions often include valuable early retirement supplements or subsidies as permanent or temporary parts of the plan, usually increasing the value of the benefit provided to these younger employees as compared to older employees, which would be a problem under the bill as written. These benefits make it easier for long-service employees to retire voluntarily before their normal retirement age.

A brief description of how early retirement supplements could work would be helpful. Under such a program, an employer provides a benefit to an employee which is payable from their early retirement date until Social Security retirement age or the normal retirement age under the plan. For example, an employer may coordinate its plan with Social Security to provide a fixed total monthly benefit for an employee electing early retirement. The fixed benefit might include the monthly amount of Social Security benefit the early retiree would be eligible for when he or she attains age 62 plus the benefit accrued under the pension plan starting at age 62, when Social Security benefits begin.

The employer would only pay the normal part of the benefit under the plan. Thus, the employee's overall benefits would remain unchanged from 55 to 62 and thereafter. The additional amounts, monthly amounts paid by the employer to the employee from 55 to 62, could not meet the cost justification standard of the bill.

The same issues exist with subsidized early retirement benefits which provide increased value for younger employees and will create problems under the bill as written.

Early retirement subsidies could not meet the cost standard of the bill because the actual amount of payment made or cost incurred on behalf of an older worker generally would be less than the amount paid or incurred on behalf of a younger worker.

Senator METZENBAUM. Mr. Rumak, you have 1 minute to conclude.

Mr. RUMAK. Thank you.

Under the bill's cost standard, employers wishing to increase benefits at early retirement, for example, by providing unreduced benefits at age 65 for those meeting the years-of-service requirements would under ERISA rules also have to proportionately increase retirement benefits for both normal and retirees and employees working past their normal retirement date.

Also, under this case under ERISA rules, ironically all vested accrued benefits of other employees would have to be increased. In many plans these increased benefits could increase costs by 48 percent or more. Not many plans could bear such increases.

[The prepared statement of Mr. Rumak follows:]

PREPARED STATEMENT OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, FRED RUMACK ON BEHALF OF

Good Morning, Mr. Chairman and members of the Committee. I am Fred Rumack, Director of Tax and Legal Services of Buck Consultants, Inc. I have over 17 years of experience in designing, drafting and providing consulting expertise in the area of qualified defined benefit and defined contribution plans, as well as nonqualified deferred compensation benefits. I have testified at numerous IRS hearings on regulatory matters and I have also appeared before the House Ways and Means Committee concerning the impact of potential legislation on employee benefits.

Buck Consultants, Inc. is a leading international pension and employee benefit consulting firm that was founded in 1916. Buck is headquartered in New York and has offices in Antwerp, Atlanta, Boston, Brussels, Chicago, Columbia, Dallas, Denver, Detroit, Dublin, Edinburgh, Fort Wayne, Honolulu, Houston, Leeds, London, Los Angeles, Madrid, Paris, Pittsburgh, San Francisco, Secaucus, Stamford, Sydney, Toronto and Washington, D.C. Buck Consultants serves over 2,000 pension and other benefit plans in all 50 states and throughout the world. These plans cover some ten million active and retired employees and have assets of more than $200 billion.

My appearance today is on behalf of the Association of Private Pension and Welfare Plans ("the APPWP"). The APPWP, of which my firm is a member, is a private, non-profit organization whose primary purpose is to protect and foster the growth of this country's private pension and employee benefit system. The APPWP was founded in 1967, and has grown since that time to represent hundreds of plan sponsors, both large and small, as well as plan support organizations such as actuarial and benefit consulting firms, investment firms, banks, insurance companies, accounting firms, and other professional benefit organizations. Collectively, the APPWP's members have substantial experience in the entire spectrum of issues relating to all types of benefit plans. APPWP members either sponsor plans themselves or provide assistance to more than 70,000 benefit plans; these plans collectively cover tens of millions of employees.

The APPWP appreciates this opportunity to testify concerning S. 1511, because the organization is concerned that this bill would require that -- if any age-based distinctions are made in plan benefits -- "for each benefit or benefit package . . . the actual amount of payment made or cost incurred on behalf of an older worker" could be "no less than that made or incurred on behalf of a younger worker." If enacted in its current form, S. 1511 would deal a devastating blow to numerous currently accepted benefit arrangements and design practices, such as early retirement subsidies and Social Security supplements under defined benefit plans, as well as early retirement window plans and severance pay plans. The bill would also prohibit benefit coordination and integration. Ironically, the effect of this bill could be particularly harmful to many of the individuals that the ADEA is intended to protect, by, for example causing plans to eliminate early retirement subsidies, and discouraging expansion of fair pension benefits coverage. Moreover, by eliminating integration of various benefit plans, this legislation would prevent allocation of dollars in a way that helps to assure that all workers receive a fair share of benefits. Instead, the result could be windfalls for some workers and little for others or a reduction for all employees covered by defined benefit plans. Also, the bill as proposed could result in significant disruption of existing benefit arrangements, including those which have been the subject of collective bargaining, as employers would have to cut back on future accruals to meet the costs imposed by the new rules. The bill's retroactive effective date compounds the potential damage, as it would impose entirely new law on long standing arrangements. In sum, this bill, though intended merely to prevent discrimination based on age, would prevent use of numerous legitimate plan design and coordination features resulting in a lessening of retirement and benefit security of all employees.

Let me preface my remarks by making clear that my testimony does not provide exhaustive treatment of all the aspects of benefit programs and practices that may be adversely affected by this bill. Use of age-related criteria is a critical element of the design of many benefit programs. Where employers are attempting to provide benefits under defined benefit plans for the remaining life of employees, calculations must be based in part on age. This does not -- indeed, cannot -- mean that all age based arrangements are invidiously discriminatory. In my testimony, I seek only to highlight the major areas of concern and focus primarily on defined benefit pension programs.

I. BENEFIT PLANS IMPACTED BY S. 1511

A. Limited Dollars are Available to Fund Benefit Programs

In considering the effects of S. 1511, one must first recognize that the overall pattern of salary and benefit structure favors older workers insofar as it generally costs employers more to provide defined benefit pensions to these employees than to younger employees. Moreover, in recent years, as benefit costs have increased, benefits have assumed a larger role in overall compensation decisions and collective bargaining. If companies are to remain competitive, they must strive to allocate the finite resources available to fund retirement and welfare benefits in the most effective way possible that provides for the best available benefits.

In determining what benefits an employer may offer employees, the employer generally looks at the total cost of the benefit package and shifts dollars among programs to best satisfy the interests of its employees and collective bargaining demands. Rational benefit programs take into account all benefits to which employees are entitled, thereby providing the maximum level of benefits to the widest range of employees. If new legislation upsets the balance between benefit coverage and limited resources, older workers may suffer as dollars provided to increase certain benefits are taken from programs providing other benefits. It should be noted that increasing, decreasing or eliminating certain benefits cannot be done in isolation under qualified plans but must be done within the context of permissible qualified plan rules (e.g., the anticutback rules must be adhered to). For this reason, S. 1511 would have a substantial impact and cost effect on the administration of plans.

For example, many employers use a substantial portion of their benefit dollars to provide defined benefit retirement plans. The benefits under such plans are usually more valuable to older employees, approaching retirement age, than to younger employees. These plans often include early retirement supplements or subsidies (as a permanent or temporary part of the plan) which are made available to younger employees and usually increase the value of the benefit provided to these employees as compared to older employees. In addition, retirement benefits are often integrated with other benefit plans or programs, such as severance pay plans. If S. 1511 is enacted as is, it could require the elimination of these features. Moreover, the increased costs imposed by S. 1511 (to assure that older employees receive benefits with a value at least as much as that received by younger employees) could force employers either to abandon or cut-back benefits available to employees who are eligible for early retirement under defined benefit plans, to the detriment of these older workers. Such disruption of the rational integrated system of these benefit programs is likely to harm, rather than help, these older employees.

B. Voluntary Early Retirement Plans

The vast majority of employers provide enhanced benefits or supplements for employees electing early retirement. Many employers have also instituted early retirement incentive programs for employees who retire within a specified period. These benefits generally fall within two types: (1) permanent early retirement supplements and/or subsidies and (2) "window" plans. Those employees taking advantage of these plans are generally over age 55, well within the class of individuals that the ADEA is intended to protect.

Moreover, the action of older workers clearly indicates a strong approval of window plans and early retirement provisions. According to a 1986 General Accounting Office Study, early receipt of employer-sponsored pensions has become common. Pension recipients as a percentage of the population in the 50-64 year old age group nearly doubled between 1973 and 1983. Research Reports shows that in 1988, 76.4% of all retirements were taken early.

1. Early retirement plan provisions

It is typical for defined benefit plans to provide either supplemental or subsidized benefits in the case of early retirement. These benefits make it easier for long-term service employees to retire before normal retirement age, although they in no way mandate early retirement.

a. Early retirement supplements

Under an early retirement supplement program, an employer provides a benefit to employees which is payable from their early retirement date until social security retirement age or the normal retirement age under the plan. For example, an employer might coordinate its plan with Social Security to provide a fixed total monthly retirement benefit for an employee electing early retirement. Such a program would work in the following way. Assume a retiree would be entitled to receive a $600 per month Social Security benefit starting at age 62, and $400 per month under the normal benefit formula of the plan. Under a social security supplement program, the plan could provide a $600 per month Social Security supplement, which would drop out when the retiree becomes eligible to collect Social Security retirement benefits. The plan would pay the early retiree $1,000 per month from age 55 to 62 and $400 per month thereafter, thereby assuring that the employees' overall benefits remained unchanged. The additional benefit of $600 per month to the employee from age 55 to age 62 could not meet the cost justification standard of S. 1511. However, it represents a common and reasonable way to allocate resources to efficiently provide adequate retirement security to employees. Among 259 plans of 162 member companies of the Council on Employee Benefits, approximately 32% of defined benefit plans provide a Social Security supplement.

b. Subsidized early retirement

To understand how subsidized early retirement programs work, one must first understand how benefits would be determined for an early retiree under a plan without such a subsidy. If no subsidy is provided, the benefit of an employee who elects to retire at age 55 rather than at age 65 (assuming this is the plan's normal retirement age), will be actuarially reduced to reflect the fact that the employee would be receiving payments earlier and over a longer period than an employee who retired at age 65. For example, assume that under a hypothetical pension plan without an early retirement subsidy, an employee who retired at age 65 with 30 years of service would be entitled to a benefit of $800 per month. Under such a plan, an employee with the same years of service and salary history who retired at age 55 would expect to receive a benefit of $288 per month, which is 64% less. The early retiree would be limited to this $288 benefit for the rest of his or her life, including the years after attaining age 65. However, if the employee who retires at age 55 defers receipt of payments until age 65, he or she would receive a benefit of $800 a month.

Under a subsidized early retirement program, the employer provides a subsidy so the actuarial reduction of benefits for long-term workers who retire early is reduced or eliminated. Often these subsidies are offered to those employees with many years of service. Some form of early retirement subsidy program is used by the vast majority of the defined benefit plans of Buck's clients, generally providing increased benefits to participants who are age 55 through 64.

Early retirement subsidies could not meet the cost standard of S. 1511 because "the actual amount of payment made or cost incurred on behalf of an older worker" would generally be less than that "made or incurred on behalf of a younger worker". The cost of providing a subsidized benefit to an early retiree is clearly greater than the cost of providing a normal retirement benefit to an older worker. Also, even though the monthly benefit that the early retiree would receive would be the same or less than the monthly benefit the older worker would receive, the expected total payment made over a lifetime to the early retiree would often be greater than the total payment made to the older individual retiring at age 65.

Under the S. 1511 cost standard, employers wishing to increase benefits at early retirement -- for example, by providing unreduced benefits at age 55, for those meeting years of service requirements -- would have to proportionally increase retirement benefits for both normal retirees and employees working past their normal retirement date. Also, under ERISA rules, all vested accrued benefits would have to be increased. In many plans, these increased benefits could increase costs by 48% or more. Given the limited resources available to provide benefits, such dramatic cost changes would probably necessitate major changes in structuring of retirement plans and benefit programs, thereby disrupting arrangements of long duration, including many that were collectively bargained.

2. Early retirement "window" plans

In addition to the permanent early retirement provisions such as those I have just discussed, many employers have offered special early retirement incentive programs to their employees for a limited period (often called a "window period") when faced with economic downturns which necessitate a reduction in their workforce. These voluntary programs are viewed, by employees and employers, as a favorable alternative to forced layoffs. They provide a humane method to deal with labor force reductions.

These window plans "sweeten" a company's normal pension benefits either by eliminating or moderating the normal reduction in pension benefits faced by retirees under a certain age (as in the case of general early retirement subsidies), or by providing benefits which supplement existing retirement benefits.

Window plans have been widely used by companies and are well accepted among employees. Twenty-three percent of the companies surveyed (121 of the 529 companies) in one 1986[1] study reported that they had offered early retirement window plans. The sizes of the companies surveyed ranged from less than 500 to over 50,000 employees. Another study[2] found that employers offering these types of plans represented a wide spectrum of business interests, ranging from manufacturing and food services to banking, broadcasting, and retailing. Both of these studies, as well as one other conducted by The Conference Board, a not-for-profit organization, found that the most prevalent reasons for offering a plan were to avoid mandatory job layoffs and to respond to sluggish economic conditions.

These studies also indicate that voluntary early retirement plans are well-accepted by employees. The 1986 Survey found that 35% of the employees who were offered a window plan chose to accept it. Certain special eligibility plans yielded acceptance rates of over 75%. The Conference Board Survey indicated that one-third of the firms interviewed described their union's position as "encouraging" early retirement. While many unions remained neutral on such programs, only four percent of the firms characterized their unions as "discouraging" early retirement.

In designing an effective early retirement window benefit program, the employer must balance two competing considerations. Generally, the retirement of a younger worker will result in greater payroll savings. However, the cost to the pension plan of providing monthly benefit increases for life to younger retirement eligible employees is substantially greater than the cost of providing the same benefit to those closer to normal retirement age. In order to maximize the effectiveness of early retirement window plans, employers often target more money for benefits for younger retirement eligible employees or limit the program to an age band of 5 to 15 years.

If actuarially equivalent total payments had to be provided to all retirement eligible employees using resources which are equivalent to those used in the past, the amount offered to younger retirement eligible employees would be so low that it would be unlikely to (a) serve as an adequate incentive for early retirement, or (b) even to permit younger employees who have many years of service but are not eligible to retire under a plan's provisions to retire with an immediately payable benefit. To illustrate, consider one early retirement window program with which I am familiar. Under this program, an employee with an average salary of $32,000 and 30 years of service (who was not eligible to retire under the plan's early retirement provisions) who chose to retire at age 50 received an immediately payable benefit of $1100 a month for life. This is an increase from $650, which would become payable at age 55. To provide actuarially equivalent benefits for all retirement eligible employees using the same funds, the employer could only offer an immediately payable $800 per month benefit or a deferred pension to such an employee. It is unlikely that a sufficient number of younger retirement eligible employees would opt to retire with this type of reduced incentive. If the dollars available to induce early retirement are spread too thin, the incentive will be lost. Therefore, few employers would find a window plan an attractive alternative to involuntary layoffs.

C. Benefit Coordination/Integration

Since employers do not have unlimited funds to provide employee benefits, they frequently coordinate and integrate their benefit programs, taking into consideration all of the benefits to which an employee may be entitled in a particular situation. This permits employers to design benefit programs that extend benefits to a larger group of employees and to distribute their benefit dollars so that the maximum number of employees receive adequate income maintenance. Many of these plans are collectively bargained between employers and unions, and are designed to allocate limited resources in an effective and coordinated manner.

For example, in order to allocate employer-provided benefits to minimize duplication of employee entitlements, a plan may offset workers compensation benefits that an employee receives against the pension payments to which the employee is entitled.

Many plans also provide that employees may receive credited service for periods of disability prior to their normal retirement age. Such crediting of service assures that an employee is not prevented from accruing the benefit that the employee would have been able to earn if the employee had not been disabled. The conceptual framework of such a benefit program hinges on the assumption that an employee is entitled to such credit only for periods prior to normal retirement age. The additional service credited to an individual disabled at a younger age will always exceed the amount credited to an individual who is disabled when older, and therefore could present problems under S. 1511. Approximately 40% of the 259 Council on Employee Benefits member's plans provide such credited service for disabled employees.

A number of employers also coordinate benefits with pension severance plans either by offering severance pay only to non-pension-eligible workers or offsetting the value of pension benefits against severance pay.

Severance benefits are normally skewed towards employees with long service and, when coordinated with pension benefits, tend to assist employees who are advanced in age but not quite old enough for retirement eligibility. This is often a relatively small group compared with the population of retirement eligible employees with similar service. Through this coordination of severance and pension benefits, employers are able to target limited funds available for severance benefits to laid-off long-term employees who are unable to tap their pension resources in order to provide for their needs during unanticipated unemployment. If employers were prevented from coordinating these plans, the severance benefits which could be offered for the same cost would have to be drastically reduced. For example, one company that we have worked with had to close a manufacturing unit. The unit had 1200 employees of which 150 had 30 years of service. However, 50 of these employees were not eligible under the defined benefit plan's provisions for early retirement. The company offered severance benefits averaging $45,000 to these 50 employees with 30 years of service who were not retirement eligible. If the same severance benefit dollars had to be divided among all the 150 employees, each would receive only $15,000. Providing $45,000 to all employees with more than 30 years of service, including those who are pension eligible, would cost $6.75 million, three times the cost of the initial plan covering only non-pension eligible workers. Loss of coordination would force employers to eliminate or reduced severance benefits that already exist, and create a significant disincentive for employers who are currently considering the adoption of such programs.

As this example illustrates, the entire object of benefit coordination is to most fairly-allocate the overall benefits among the largest number of employees. Coordination prevents pyramiding of benefits, providing duplicate coverage to some and thereby reducing the minimum benefits available to all. Coordination requires targeting of any additional employer-provided benefits to those with fewest other available resources. Preventing such coordination, as I am advised S. 1511 would do, will simply result in windfalls to those employees provided with duplicate coverage and impose hardships on those who receive much smaller benefits due to cutbacks needed to finance the broader provision of benefits under each individual plan. Of course, since severance plans are voluntary, an employer could generally reduce or eliminate severance benefits for terminations that occur after the law takes effect.

Benefit integration is an important tool to encourage employers to adopt pension and benefit plans and enable them to allocate resources rationally among the greatest number of people. Coordination of workers compensation benefits has been upheld by the United States Supreme Court in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), and coordination of employer-provided Social Security benefits is permitted by ERISA and regulated by Internal Revenue Code provisions for qualified plans. Accordingly, numerous plan sponsors have used various types of integration in plan design, never imagining that such integration might be prohibited.

D. Actuarial Calculations

I will leave to the legal experts who will testify today a discussion of the precise legal effect of S. 1511 on age-based calculations. However, I have been advised that EEOC has taken the position in litigation that: (a) any use of age-based data would create a prima facie violation of ADEA, and (b) the present value of the cost of benefits is not a sufficient showing of an age cost justification. Without use of actuarial calculations it would be impossible to provide pension payments in many commonly used forms. Furthermore, it would be impossible to structure defined benefit plans. Moreover, use of actuarial calculations is a cornerstone of the regulatory systems established for qualified pension plans under the Employee Retirement Income Security Act of 1974, as amended (ERISA). In many areas, the Internal Revenue Service ("Service") requires that calculations be made in accordance either with general actuarial tables or with tables that the Service itself has devised.

Currently, actuarial data is used to calculate monthly and annual payments under joint and survivor annuities and preretirement survivor annuities, as well as for distributions made over a participant's life or life expectancy, or the joint lives or joint and last survivor expectancy of a participant and beneficiary. Such payment options are common. In fact, payment in the form of a joint and survivor annuity or preretirement survivor annuity is required for tax qualified defined benefit plans and certain defined contribution plans, unless waived by a spouse and participant. Furthermore, actuarial data is used in order to determine benefit equivalencies when benefits are paid before or after normal retirement age. There is no alternative available for calculating benefits and no way to comply with ERISA's requirements and IRS funding requirements unless actuarial calculations are used.

The general effect of this use of actuarial data is to equate the actual cost of benefits and to justify higher contributions on behalf of older retirees. Therefore, it would be ironic if S. 1511 were interpreted to prohibit its use.

To prohibit use of actuarial data and calculations by benefit planners is equivalent to requiring mathematicians to do calculations without numbers. It is an impossible task. To the extent that S. 1511 would mandate such a result, it is totally unworkable.

II. THE RETROACTIVE APPLICATION OF S. 1511

It is important to understand that the benefit structure that I have described in my testimony is far from new, having been established in the 1940's and 1950's, well-before the enactment of the ADEA. This structure has been retained since ADEA's enactment, and was in existence before the United States Supreme Court issuance of Public Employees Retirement System v. Betts, 57 U.S.L.W. 4931. To this day, these elements remain an integral part of plan design.

As I discussed, S. 1511 threatens numerous common features of plan design such as early retirement subsidies, Social Security supplements, coordination between pension and severance plans, and workers compensation and disability offsets.

Requiring elimination of these design features, even prospectively, could wreak havoc upon employee benefit programs, including retirement plans, savings plans and welfare benefit plans, as employees seek to restructure benefits to meet the new standards without increasing costs.

Moreover, retroactive application of the standards seems unfair and would impose a huge unfunded liability on benefit programs that could only be disruptive and harmful to the American worker. The bill could result in significant curtailment of future benefits, as employers attempt to restructure plans to comply with the new rules without violating Internal Revenue Code restrictions on cut-backs of accrued benefits for qualified plans.

Furthermore, a mandated increase in benefits which is retroactive for older employees would require, on account of ERISA rules, an increase for all accrued benefits under a defined benefit plan and could raise employer costs substantially.

III. CONCLUSION

In summary, this bill would have negative effects that run contrary to the purposes of the ADEA itself and would disrupt long-standing employee benefit planning. We strongly believe that older workers are a vital component of our labor force and we fully support the ADEA's goal of encouraging and protecting such workers. However, S. 1511 is not a proper vehicle for achieving this end. We urge Congress to further consider the full ramifications of this measure prior to undertaking any action in this area.

We appreciate the opportunity to appear before you today and our members will be happy to continue working with you and your staff in this complex and important area.

FOOTNOTES

1. *See* Hewitt Associates, *Plan Design and Experience in Early Retirement Windows and in Other Voluntary Separation Plans* (1986) (hereinafter "Hewitt Survey").

2. *See TPF&C Survey of Early Retirement Incentive Plans: Summary of Responses* (December 1985) ("TPF&C Survey").

Senator **Metzenbaum**. Thank you very much, Mr. Rumak. I appreciate your testimony.

All of the testimony will be included in the record.

Mr. Burton Fretz, executive director, National Senior Citizens Law Center.

Mr. **Fretz**. Thank you, Mr. Chairman.

Members of the committees, my testimony has been submitted. In addition, the Law Center is a member of the Leadership Council of Aging Organizations, a coalition of national aging groups. And by letter to Senator Pryor, the Leadership Council has voiced its strong endorsement for the legislation that is under consideration today.

Senator **Metzenbaum**. There are two pieces of legislation under consideration. Have you indicated which one, or do you support both?

Mr. **Fretz**. I believe the letter singles out S. 1511, but the principle is broad enough to encompass S. 1293 as well. That is my understanding.

I do suggest that there is a broad consensus, which certainly includes the business community, behind the principle of both bills that are being considered. There really is a unanimity of agreement that age discrimination in the workplace is wrong in principle, that the prohibitions against such discrimination should apply to employee benefits, and if there are to be exceptions those should be quite narrow ones and should be cost related.

I submit to the Senators that there is probably one issue which is the sticking point, and if that can be resolved, things could move rather rapidly. That issue is the question of whether the bills should address and how they should address, the practice of integration of benefits and specifically the coordination of severance pay with early retirement benefits.

The argument for such coordination, as I understand it, is really one of fairness. When a layoff occurs, a company may just have so much money to pass around among displaced workers. If early retirement eligibility and early retirement pensions can be considered, that is a way of spreading the existing pot around to the younger workers.

However, I do submit that on analysis, fairness considerations really cut the other way. Most pension plans that provide for early retirement will denominate, say, age 65 as the normal retirement date and age 55 as the date on which a worker becomes eligible for early retirement. But when the worker takes early retirement, then the amount of the monthly pension is decreased, most commonly by about 4 percent for each year of early retirement. So if a worker retires at 55 rather than 65, you knock off 40 percent.

You can imagine how that would play out in differences between a 50-year-old worker and a 55-year-old worker in the same shop that is subject to a reduction-in-force. The 50-year-old worker has severance pay, which is normally a function of service and current salary. The 55-year-old worker doesn't get it under integration. When that 50-year-old worker retires at age 65, he will get a full pension benefit. The age-55 worker is effectively forced to retire at 55 and will have a substantially reduced pension benefit, like the levels described earlier by Mr. Sousa.

What we are talking about over 10 or 15 years is a differential of probably $30,000 to $40,000 per worker, which is a significant amount, and a difference in treatment both because the age-55-and-above worker is told that severance pay will be denied, so that worker doesn't have the pay to tide him or her over a period of unemployment, and second, because that worker has a reduced pension.

Pension and severance benefits serve very different purposes, and for that reason we believe that the current EEOC regulations limiting the benefit package approach in such a way that it excludes such an integration, is wisest and fairest.

Imagine, if you would, a layoff situation where a company told minority workers that it just didn't have enough money to go around and would have to pay minority workers less than the white workers. That would clearly and quickly be recognized as intolerable. And the same sort of analysis has to apply to integration plans which really treat workers differently based on age.

I think, as a factual matter the difficulty of reemployment for a laid-off worker increases with age. An age-45 worker is going to be reemployed faster on average than an age-55-and-above worker. Statistically, according to the Department of Labor, those workers 55 and above will experience unemployment periods of about 63 percent longer than their under-55 counterparts. So it is really the older worker who needs severance pay during that unemployment period more than any other. I think arguments of fairness really do militate in favor and in support of the policy behind the current EEOC regulations which are recognized in S. 1511.

[The prepared statement of Mr. Fretz follows:]

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STATEMENT OF BURTON D. FRETZ, EXECUTIVE DIRECTOR

NATIONAL SENIOR CITIZENS LAW CENTER

before the

SPECIAL COMMITTEE ON AGING, and the SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
UNITED STATES SENATE

SEPTEMBER 27, 1989

Mr. Chairman and Members:

The National Senior Citizens Law Center is a national support center which provides representation and legal assistance on problems of the elderly poor in approximately 4,000 cases each year. The Law Center is a member of the Leadership Council of Aging Organizations, which has communicated its strong endorsement of S. 1511 presently under consideration.

Importance of this Legislation. S. 1511 returns the law to its state prior to the ruling of the Supreme Court on June 23, 1989 in the case of Public Employees Retirement System of Ohio v. Betts. That decision swept aside twenty years of federal interpretation of the Age Discrimination in Employment Act (ADEA) by the agencies and courts, and instead immunized virtually all employee benefits from liability under the Act.

S. 1511 restores Congress' original intent behind the ADEA to prohibit discrimination against older workers in all employee benefits except where age-based reductions in benefits are justified by significant cost considerations. The bill would place the burden on the employer to prove that an employee benefit plan that discriminates against older workers comes within this exception. It would apply to all actions and proceedings pending on June 23, 1989, or brought after that date.

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We believe there is broad support for the objectives of this legislation. No responsible voice today suggests that an employer should be wholly free to discriminate against older workers in benefit plans. The letter of endorsement from the Leadership Council of Aging Organizations includes an attachment which describes the need for S. 1511 and responds to questions about it.

The Benefit Package Question. The single point over which serious disagreement arises involves the integration of a severance pay package with other benefits such as early retirement during a company's reduction in force. The effect of integration usually is to deny severance pay to an older worker who is eligible for an early retirement pension, or to offset the value of one against the other. Typically, both private and public sector pension plans permit employees to retire before they attain the age and service requirements needed for the payment of full benefits. Ordinarily, normal retirement is available at age 65 and early retirement is available at age 55.

S. 1511 permits an employer to demonstrate an equal cost justification with respect to "each benefit or benefit package" permitted under existing interpretation of the ADEA by the Equal Employment Opportunity Commission (EEOC). 29 C.F.R. 1625.10. The EEOC interpretation does not apply a benefit package to a retirement or pension plan, and thus does not permit eligibility for early retirement to disqualify that worker from receipt of severance pay.

The case for allowing off-sets to severance pay is one of fairness. An older worker who is eligible for early retirement, so the argument goes, should not be permitted to "duplicate" benefits by receiving severance as well. Cutting off older workers from severance pay leaves more to pass around to younger workers.

The Real Effects of Offset. On closer analysis, the argument of fairness disappears. A forty-five year old worker who is laid off will receive both severance pay and a full pension on later retirement. A 55 year old worker laid off at the same time will lose all severance pay, if eligible for early retirement.

The older worker also will suffer a reduction in pension benefits, because they are drawn down before the worker reaches normal retirement age. Private and public pension plans uniformly require that benefit amounts be reduced when employees retire early, according to a General Accounting Office study. About 80 percent of plans reduce benefits by a percentage formula and the remaining 20 percent reduce benefits by an actuarial adjustment. Features of Non-Federal Retirement Programs, GAO/OGC-84-2 (1984).

Pension plans commonly provide for a four percent reduction in benefits for each year before age 65 that retirement occurs. A plan which pays full benefits for retirement at age 65 of $600 per month, for example, may be reduced by 40 percent for early retirement beginning at age 55. This lowers the monthly pension benefits to only $360.

As a result of off-set, therefore, the younger worker receives full severance pay and a full pension on retirement. The older worker receives no severance and a reduced pension on retirement.

Older Worker Unemployment. The denial of severance pay to older workers is especially severe because older workers usually need this benefit the most. The purpose of severance pay, unlike early retirement, is to tide a worker through an extended period of unemployment until suitable re-employment is located.

Unemployment hits older workers the hardest. Nearly eleven million workers lost their jobs because of plant closings and cut-backs in a recent four year period. This includes nearly a million workers over the age of 55, half of whom were displaced from jobs they had held for fifteen years or more. Of all older workers who lost their jobs, less than half of them became re-employed.

Workers over age 55 spend an average of 33 weeks without work. Periods of unemployment run 63 percent longer than for younger workers. Moreover, older workers are three times more likely to leave the labor force than others because they have a much lower chance of finding re-employment.

The fact that some severance pay plans are subject to collective bargaining does not change these concerns. For twenty-two years, arbitrary age discrimination in the work place has been contrary to law. The ADEA does not allow age discrimination in setting the compensation of employees, or in the forced retirement of employees, and it does not allow the rights of any individual worker protected under the law to be waived through the collective bargaining process. We would not permit severance pay to be bargained away on grounds of race, or of sex, and we cannot do so on grounds of age.

We urge your prompt action on S. 1511. Thank you for this opportunity to testify.

Senator **Heinz**. Mr. Chairman, may I ask a question at this point?

Senator **Metzenbaum**. Certainly.

Senator **Heinz**. You know, just something struck me as a result of your testimony. The early retirement benefit that most companies give is above the actuarial amount, as you pointed out, that the worker would normally receive. There is a bonus, if you will, for retiring early.

Is it possible—obviously it's possible—is it good or bad policy to think of early retirement benefits as two, as being split into two benefits—one the actuarially determinable portion; and second, the bonus portion—and considering whether or not the bonus portion and severance pay might in fact be considered for integration in some way?

Mr. **Fretz**. Senator Heinz, it's a little difficult to answer without looking at actual numbers. But my reaction is that severance pay can be quite substantial, and to exclude that pay from an older worker even if the early retirement contained some bonuses, is still a significant loss for that worker. As we have seen, it could be a loss of $20,000 to $30,000.

Senator **Heinz**. Well, here is what is going around in my mind. This isn't a conclusion. But it is simply this: If the purpose of the increment of what I will call the bonus in the early retirement pension benefit is to get the employee to do something voluntarily that they might or might not otherwise do, and if the purpose of severance pay is to assist the employee until they are eligible for retirement, it would seem to me that a policy that insists that an employee gets not only severance pay but also on top of the actuarial pension benefit, which I believe the employee ought to get, but also the bonus for early retirement, might result in an unnecessarily costly and in a sense hard-to-justify increase to the employee.

Or to put it another way, if the employer simply had a pension plan which you could get into without the voluntary features, there would be no argument, you know, in terms of prohibiting the exclusion of severance pay with pensions. And in a sense, if we want employers to have voluntary retirement incentives—maybe we don't; I mean that is another issue—but if we want employers to have voluntary retirement incentives, maybe we should consider what the policy implications of treating every element of pension benefits alike.

Mr. **Fretz**. Yes. I think the greatest challenges, Senator, have arisen in those plans in which the employee doesn't have the option. The employee cannot choose between severance or early retirement, but is simply told "because you're age 55 or above you're cut off from it."

I have not had an opportunity to scrutinize plans that provide an option. And if the choice is there, I think the element of fairness is there.

Senator **Heinz**. I just raise it as something to think about at this point. I am not quite sure where I come out on it, but I wanted to just kind of throw that in.

Mr. Chairman, thank you for yielding to me.

Senator **Metzenbaum**. Thank you very much, Senator Heinz.

Thank you, Mr. Fretz.

Our fourth witness is Mr. Mark Dichter of Morgan, Lewis & Bockius, of Philadelphia.

Happy to have you with us, sir.

Mr. DICHTER. Thank you very much, Senator Metzenbaum and members of the committee.

I am a partner in the law firm of Morgan, Lewis & Bockius in Philadelphia, where I practice labor and employment law, representing employers for over 20 years. I am the immediate past chairman, cochairman of the ABA's Committee on Equal Employment Opportunity Law. I am appearing here today on behalf of the Association of Private Pension and Welfare Funds, the ERISA industry committee, the U.S. Chamber of Commerce, and the National Association of Manufacturers.

Senator METZENBAUM. Are they each paying you separately?

Mr. DICHTER. I wish they were. [Laughter.]

Senator METZENBAUM. You don't have to answer.

Mr. DICHTER. I appreciate this opportunity, and my remarks will be a brief summary of my written remarks which I understand will be included in the record.

Senator METZENBAUM. All of the statements will be included.

Mr. DICHTER. Thank you.

Senator METZENBAUM. The full statements will be included in the record.

Mr. DICHTER. I would like to address in particular three concerns that we have about the potential impact of the legislation that now is before you. One area is the question of coordination or integration of benefits, which we have heard a considerable amount about; second and very briefly, voluntary early retirement incentive plans; and thirdly, the potential impact upon actuarial assumptions and other elements of existing plans.

One of the premises that I would like to address initially, though, is the suggestion that there has been a uniform interpretation of 4(f)(2) benefit plans and the cost-benefit requirement. That simply is not accurate. In our written testimony at pages 17 through 30 we cite numerous example of various courts where they have applied varying standards, not always requiring the cost-justified basis. In fact, EEOC itself has recognized at least in one circumstance, early retirement, that the cost benefit can't be the driving force. So I think that premise is not an accurate one.

On the question of coordination of benefits, I think there are several points that I would like to make. We heard with some interest the testimony of one of the individuals this morning, Mr. Sousa, concerning his situation where his severance pay was reduced on the basis of his actuarial value of his pension benefits.

It is interesting to note in contrast his situation with those of Federal employees where, if he was a Federal employee, he would have gotten no severance whatsoever because Congress has provided that not only is there a set-off against pension versus severance pay, but that with respect to Federal employees, if you're eligible for a retirement benefit you cannot receive any severance pay.

So Congress itself, when it has been acting as the employer of Government employees, has recognized—not just talking about congressional employees but about Federal employees—that those purposes can and should be recognized.

So, in fact, Mr. Sousa, in the private sector, was better off than he would have been as a Federal employee.

Senator **Heinz**. Mark, since I assume you are a constituent, I have got to warn you that next time I see you in Philadelphia and you complain about something we're doing in Washington, DC, these words will come back to haunt you. [Laughter.]

Mr. **Dichter**. I am sure they will.

It's also interesting to note, in Mr. Sousa's case, when he was answering questions about the union position, this was a collectively bargained question. That is, the integration question, the fact that one could be set off against the other, was something that the union negotiated for and agreed to. Now, whether they supported his litigation challenging it or not, the important thing was that even after the existence of the ADEA, this was a provision which the union jointly agreed to with the company.

Senator **Metzenbaum**. Didn't they agree to it before the ADEA became law?

Mr. **Dichter**. My understanding is they renewed that provision in the contract as late as 1983. So the ADEA was in fact law, clearly at that point, yes. This was a renewed provision in their collective bargaining agreement, yes. As was the case, by the way, with the Federal employees where it was done both before and after the ADEA was applied to Federal employees.

Also, I think it's important to keep in mind that severance pay is not a mandated benefit by any provision at all and, in fact, other than in the collective bargaining context is something which could be unilaterally eliminated by employers. It is not a vested benefit. It is typically a welfare plan which the employer could eliminate at any time.

So if the employer was not permitted to integrate those benefits, there is no reason to believe that employers would not simply reduce the total amount of severance—keep the amounts the same and reduce the benefits for all employees if they had to be spread differently.

The question of voluntary early retirement incentive plans I will only address very briefly to say that even as the EEOC has recognized, the present legislation would jeopardize those plans which have generally been recognized to provide benefits to older workers. And therefore that presents a significant concern, I think, to all of us.

The question of actuarial assumptions provides probably the most complex issue of all. I think as a couple of the Senators mentioned earlier today, when we are dealing with employee benefits, it is an extremely complex matter and what may seem like a simple solution on its case, like section 89 may have seemed like a very simple solution on its face for fair treatment, we have come to learn is one that may not be as simple as it seems. I suggest the same thing here when you apply blindly principles of cost-benefit analysis and then suggest that is a simple matter.

In fact, the case out of Pennsylvania involving the city of Mt. Lebanon was a question with disability benefits where they went to their insurance company, had a reduced benefit relied on what the insurance company plan was, and the EEOC argued that was not sufficient, they had to provide their own cost justification.

Senator **Metzenbaum**. Thank you very much.

Mr. **Dichter**. You're welcome.

[The prepared statement of Mr. Dichter follows:]

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PREPARED STATEMENT OF MARK S. DICHTER

ON BEHALF OF

THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS,

THE CHAMBER OF COMMERCE OF THE UNITED STATES,

THE NATIONAL ASSOCIATION OF MANUFACTURERS,

AND

THE ERISA INDUSTRY COMMITTEE

Messrs. Chairmen and Members of the Committees, I am Mark S. Dichter, a partner in the law firm of Morgan, Lewis & Bockius, where, for over 20 years, I have been engaged in the counseling and representation of employers in all aspects of labor and employment law and, in particular, equal employment opportunity law. I am testifying here today on behalf of the Association of Private Pension and Welfare Plans ("APPWP"), the Chamber of Commerce of the United States ("the Chamber"), the National Association of Manufacturers ("NAM"), and the ERISA Industry Committee ("ERIC"). I am grateful to have the opportunity to present to these Honorable Committees the concerns of the APPWP, the Chamber, NAM, and ERIC, as well as my own concerns, as to the significant adverse impact the passage of S. 1511/S. 1293 will have on widely used fringe benefit and retirement plans which provide extensive benefits to all workers and, in particular, to older workers.

I have recently completed a three year term as the Management Co-Chair of the Committee on Equal Employment Opportunity Law of the American Bar Association's Section on Labor and Employment Law ("ABA EEO Committee"). I have also served as the Editor-in-Chief of the Supplements to Employment Discrimination Law, published by the American Bar Association and the Bureau of National Affairs. This is generally recognized as the leading treatise in the field of employment discrimination law.

The ABA EEO Committee is the principal organization representing practicing lawyers in the equal employment field. Our members consist of attorneys who regularly represent employees, claimants, labor organizations, employers, and organizations such as the American Association of Retired Persons ("AARP") and the NAACP Legal Defense Fund, Inc. The ABA EEO Committee is the primary liaison between the American Bar Association and the Equal Employment Opportunity Commission and the U.S. Department of Labor with respect to equal employment matters. Through the liaison activities of the ABA EEO Committee and my counseling and representation of employers with respect to age discrimination and employee benefit issues, I have had extensive experience with respect to the Age Discrimination in Employment Act ("ADEA") and its impact on employee benefit plans.

Though entitled the "Older Worker's Benefit Protection Act," the proposed amendment to the ADEA, if enacted, would: (1) jeopardize many existing retirement plans which are based on generally accepted, actuarially based, principles; (2) jeopardize the use of popular early retirement incentive programs; and (3) invalidate many widely utilized benefit practices, including the coordination of various benefit programs and the use of general mortality tables. The proposed legislation thus would adversely affect most directly those benefit plans which benefit older workers in particular. In short, the legislation would hurt most those older workers it purports to protect.

Section 2 of the Bill sets forth a "finding" that "legislative action is necessary to restore the original Congressional intent in passing and amending" the ADEA. The finding is premised upon the conclusion that the Supreme Court's recent decision in Public Employees Retirement System of Ohio v. Betts, ____ U. S. _______, 109 S. Ct. 256 (1989) subverted the original Congressional intent. Section 2 further describes the intent of Congress in 1967, when the ADEA was passed, and in 1978, when it was amended, as being "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." These findings are incorrect as a matter of fact and law and, more importantly, are imprudent as a matter of policy. As a result, the legislation attempts to remedy a problem that does not exist, and in the process, actually imperils the benefits of all workers and, in particular, the benefits of older workers.

Inherent in the rush to amend the ADEA in light of the Supreme Court's Betts decision is the erroneous assumption that the Supreme Court's holding -- that Section 4(f)(2) of the ADEA exempts employee benefit plans from the coverage of the Act except to the extent plans are used as a subterfuge for age discrimination in other aspects of the employment relation -- somehow will result in employers changing their benefit plans to the detriment of older workers. With respect to age discrimination, however, retirement and other benefit plans are not somehow different in their design and operation today than they were in 1967 when they were first exempted from the ADEA. In all pertinent respects, they are the same. Retirement plans have always taken into account actuarial considerations; early retirement incentives have long been provided; and most plans have always coordinated the benefits provided with those provided by other benefit programs. Congress recognized this and the significant problems that would be presented by the impact on benefit plans of any age discrimination legislation that failed to take these factors into account. That is the reason the 1967 Congress exempted bona fide employee benefit plans from the ADEA.

Factors Leading To The Enactment Of The ADEA In 1967

In considering age discrimination legislation back in the 1960s, Congress understood that age discrimination is by nature different from discrimination on the basis of race or sex. For that reason, it did not include age among the prohibitions in Title VII. Rather, recognizing the complexity of age discrimination issues, Congress directed the Secretary of Labor to study the problem of age discrimination in employment. The Secretary did so and, in June 1965, drew the conclusion that "'discrimination' means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving -- for example -- race." The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, at 2 (1965) ("Secretary's Report"), reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967, at 20 (1981) ("EEOC Legislative History").

The Secretary's Report found that, in contrast to race discrimination, age discrimination is rarely based on a mere dislike for older workers. Id. Rather, the Report found that age discrimination is principally based on three other factors: (a) unfounded assumptions about the effect of age upon ability to perform; (b) actual relationships between age and ability to do a job; and (c) institutional arrangements -- such as pension, seniority, insurance, and promotion-from-within policies -- that, although often designed to protect the older worker, may have an adverse impact on the hiring of older workers. Id. Importantly, the Report made it clear that only decisionmaking based on unfounded assumptions about the effect of age on ability constitutes "arbitrary age discrimination" within the meaning of Congress. Id. The Report concluded that it is "contrary to the public interest[] to conceive of all age restrictions as 'arbitrary'" and thus recommended that Congress "concentrate on the prohibition of practices which include this element." Id. at 21.

Significantly, the Report also made it clear that employee benefit plans are "institutional arrangements" which, while sometimes adversely affecting the employment of older workers, are not examples of the "arbitrary" age discrimination with which Congress should be concerned. Secretary's Report, at 15. Moreover, the Report stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." Id. at 16. The Report concluded that "[c]ase-by-case examination is necessary" to determine which benefit "plan-induced limitations on employment can be considered to constitute arbitrary discrimination[.]" Id. at 17.

Accordingly, when the Secretary, at Congress's request, submitted a draft bill, he did not include the version of § 4(f)(2) that is presently in the statute. Rather, § 4(f)(2) of the Administration bill provided only that it shall not be unlawful "to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purpose of this Act[.]" EEOC Legislative History, at 68. Senator Yarborough introduced the Administration bill, and both houses conducted extensive hearings at which numerous witnesses testified.

On the very first day of hearings, Senator Javits criticized this aspect of the Administration bill, stating that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treatment under pension plans a condition of that employment.

Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) ("Senate Hearings"). In his view, a "fairly broad exemption ... for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." Id. at 28. As a result, he proposed to introduce an amendment that would grant employers "a degree of flexibility" with respect to employee benefit plans. Id. at 27.

Although Secretary of Labor W. Willard Wirtz testified that "the effect of the provision in section 4(f)(2) [of the Administration bill] ... is to protect the application of almost all plans which I know anything about" (Senate Hearings at 53), Senator Javits, the next day on the Senate floor, proposed to replace § 4(f)(2) of the Administration bill with an amendment making it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual.

113 Cong. Rec. 7077 (March 16, 1967), reprinted in EEOC Legislative History, at 72. Senator Javits reiterated his view that "the age discrimination law is not the proper place to fight this particular battle," and noted that he had "recently introduced a comprehensive bill to deal with this problem." 113 Cong. Rec. 7076 (March 16, 1967), reprinted in EEOC Legislative History, at 71. The bill to which he referred was a precursor to ERISA, the comprehensive benefits statute that Congress eventually enacted in 1974.

In subsequent hearings, representatives of the business community also urged that a broader exception for employee benefit plans be adopted than that contained in the Administration bill. Otherwise, they said, "hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)." Senate Hearings, at 280; see also, e.g., id. at 296, 323.

The reported bill included an amendment (with slight modification) like that proposed by Senator Javits. In floor debate before the Senate, Senators Javits and Yarborough discussed the full effect of § 4(f)(2), making it clear to all that an employer would not have to provide the same benefits to older workers that it provides to younger ones, and that an older employee who would not have been employed except for the law does not have to be included in a benefit plan at all. 113 Cong. Rec. 31255, reprinted in EEOC Legislative History at 146. Indeed, Senator Yarborough specifically stated that "this will not disrupt the bargained-for pension plan. This will not deny an individual employment or prospective employment but will limit his rights to obtain full consideration in the pension, retirement, or insurance plan." Id.

It is just as clear from the floor debate in the House that members of that branch similarly understood that the amended § 4(f)(2) would broadly protect employee benefit plans, even where the plans completely excluded older workers. See, e.g., 113 Cong. Rec. 34740 (December 4, 1967)(remarks of Rep. Perkins), reprinted in EEOC Legislative History, at 151; 113 Cong. Rec. 34750 (December 4, 1967)(remarks of Rep. Randall), reprinted in EEOC Legislative History, at 161; 113 Cong. Rec.

34745 (December 4, 1967)(remarks of Rep. Smith), reprinted in EEOC Legislative History, at 156. Representative Dent, Chairman of the House Committee, thus stated that the amended § 4(f)(2) "serves to emphasize the primary purpose of the bill -- hiring of older workers -- by permitting employment without necessarily including such workers in employee benefit plans. The specific exception ... is considered vital to the legislation." 113 Cong. Rec. 34747 (December 4, 1967), reprinted in EEOC Legislative History, at 159.

It was with this understanding that Congress passed the bill as amended, and it was signed into law.

It is, therefore, simply not true that, in enacting the Age Discrimination in Employment Act, Congress intended § 4(f)(2) to be limited by an age-related cost justification test. In fact, exactly the opposite is the case. Cost justification requires case-by-case scrutiny of individual eligibility requirements and benefit levels, an approach Congress dismissed when it declined to adopt the Administration bill as proposed. It fails to acknowledge that employee benefit plan-related barriers to the full employment of older workers extend beyond age-related benefit costs, and thus does not fully respond to the institutional concerns which the Secretary and Congress found had resulted in the unemployment of older persons. Indeed, if § 4(f)(2) was limited to strict age-based cost justifications, then a myriad of employee benefit plans which existed at the time of the enactment of the ADEA -- plans, which relied on various age-based actuarial assumptions and contained various benefit integration schemes -- would have been deemed unlawful and would have had to have been changed. This is obviously contrary to Congress' clear intent to prevent the disruption of employee benefit plans in the passage of the ADEA, and to leave their regulation to a more studied and comprehensive statutory scheme dealing directly with employee benefits.

The Comprehensive Regulations of Employee Benefits Was Accomplished by Congress Through the Enactment of ERISA

After the ADEA was enacted, Congress did not forget its concerns about employee benefit programs. In 1974, it enacted the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq*., fulfilling its promise to comprehensively regulate the full gamut of employee benefits.

ERISA represents, as the Supreme Court has unanimously observed, "a 'comprehensive and reticulated statute,' which Congress adopted after careful study of private retirement pension plans." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), *quoting* *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). ERISA established minimum rules for employee participation, funding standards to increase solvency of pension plans, fiduciary standards for plan managers, and an insurance program in case of plan termination. Recognizing the complexity of this subject, Congress divided administrative responsibility among several agencies -- principally, the Department of Labor, the Internal Revenue Service and -- a new entity created by ERISA -- the Pension Benefit Guaranty Corporation.

Some supporters of S. 1511 assert that, from the beginning, it was Congress's intent that retirement benefits not be integrated with other benefits. They say that pension and other benefits (such as separation pay benefits) serve different purposes and thus may never be treated as substitutes for each other. Contrary to these claims, however, it is clear that, in enacting ERISA, "Congress did not prohibit 'integration,' a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees." Alessi, supra, 451 U.S. at 514. Rather, following its extensive study of private pension plans before the adoption of ERISA, Congress "acknowledged and accepted the practice, rather than prohibiting it." Id. at 516. The Report of the House Ways and Means Committee noted that

> many present plans are fully or partly integrated and ... elimination of the integration procedures could substantially increase the cost of financing private plans. Employees, as a whole, might be injured rather than aided if such cost increases resulted in slowing down the growth or perhaps even eliminate[ing] private retirement plans.

H.R. Rep. No. 807, 93d Cong. 2d Sess. 69 (1974), *reprinted in* 2 *Legislative History of the Employee Retirement Income Security Act of 1974* 3189 (1976). Further, as the Supreme Court recognized in *Alessi*, "integration allows the employer to attain the selected pension level by drawing on other resources, which, like Social Security, also depend on employer contributions." 451 U.S. at 514. Indeed, as the Court further recognized, integration of benefits promotes the provision of benefits and the sound funding of pensions plans. 451 U.S. at 514-516.

Thus, it is patent that, contrary to the findings contained in Section 2 of the bill being considered by this Committee, it was not the original intent of Congress in passing the ADEA that bona fide employee benefit plans be subjected to a cost justification test or an anti-integration rule. Because the integration of benefit plans was not even an issue at the time that Congress passed it, the ADEA does not expressly address the subject, since it exempts all bona fide employee benefit plans. However, when the issue *was* expressly addressed in Congress's consideration of ERISA, the intent of Congress on that point is undeniably clear: it approved of this longstanding design practice.

That the purposes of the ADEA do not preclude the integration of benefits is confirmed by the fact that Congress has expressly proscribed the payment of severance benefits to various groups of retirement-eligible federal employees. Congress enacted these proscriptions both before and after the ADEA was enacted in 1967 and extended to federal employment in 1974; indeed, the principal proscription was enacted by the same Congress that enacted the ADEA. See 5 U.S.C. § 5595(a)(2)(iv). See also 10 U.S.C. § 1186(b)-(c)(1983) and 10 U.S.C. § 1174(e),(h)(1983 and 1986 Supp.)(officers and enlisted members eligible for voluntary retirement from active military service not entitled to separation pay); 14 U.S.C. §§ 286(b), 296a(d), and 327(b)(1988 Supp.)(Coast Guard officers); 33 U.S.C. § 853h(e)(1986)(commissioned officers of National Oceanic and Atmospheric Administration). A finding that the ADEA has always precluded the integration of benefits requires this body to conclude that Congress has repeatedly flouted its own declaration of policy. There is simply no basis in the ADEA for a finding that Congress has committed "such a breach of faith." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 90-91 (1973).

The 1978 Amendment Only Prohibited Involuntary Retirement; No Other Changes Were Made to Section 4(f)(2)

Congress began considering the possible amendment of § 4(f)(2) in 1977. At that time, the federal circuit courts of appeals had issued conflicting decisions concerning the legality of involuntary retirement provisions. Compare Brennan v. Taft

Broadcasting Co., 500 F.2d 212 (5th Cir. 1975)(such provisions lawful) and Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977)(same), cert. denied, 434 U.S. 1008 (1978) with McMann v. United Air Lines, Inc., 542 F.2d 212 (4th Cir. 1976)(such provisions unlawful). Although the Supreme Court had granted a writ of certiorari in the McMann case so that it could address the issue, the House Committee on Education and Labor decided to resolve the conflict itself.

On July 25, 1977, the Committee reported a bill proposing to amend § 4(f)(2) to make it clear that no employee benefit plan could require or permit the involuntary retirement of an individual because of his age. See H.R. 5383, 95th Cong., 1st Sess. (July 25, 1977), reprinted in EEOC Legislative History, at 392. The scope of the amendment referred to the Senate was very limited, as is evident from the legislative history. See, e.g., H.R. Rep. No. 527, 95th Cong., 1st Sess. 26-30 (1977), reprinted in EEOC Legislative History, at 386-90 (additional views of Rep. Weiss)(the amendment's only effect would be to make mandatory retirement unlawful); 123 Cong. Rec. 34323 (October 19, 1977)(remarks of Sen. Kennedy), reprinted in EEOC Legislative History, at 510 (amendment "clarifies the congressional intention behind [§ 4(f)(2),] which allows lesser benefits to be given to older workers in pension, retirement, and insurance plans"; "the differentiation is allowed for purposes of fringe benefits alone and is not for purposes of allowing an earlier retirement age").

While a House-Senate conference committee was considering the two chambers' respective bills, the Supreme Court handed down its decision in United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977). The Court ruled that the ADEA, as originally enacted, did not prohibit involuntary retirements pursuant to the terms of a bona fide employee benefit plan. The Court reasoned that the language and legislative history of the statute indicate that Congress intended generally to insulate employee benefit plans from challenge under the ADEA; that plans can be challenged only if they are a "subterfuge" to evade the requirements of the ADEA; and that an involuntary retirement provision of a plan that pre-dates the enactment of the ADEA cannot possibly be such a "subterfuge." The Court concluded that:

> [W]e find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before its passage, or intended to require employers to bear the burden of showing a business or economic purpose to justify bona fide pre-existing plans.

Id. at 203.

Thereafter, after the Conference Committee released its report and the amendment was debated on the floors of both houses, the amendment was passed. The statutory language focuses on the involuntary retirement issue. The legislative debate also was principally directed to this issue. Those voting for the amendment stressed that, with the exception of abolishing involuntary retirement provisions, the amendment "would not alter existing law with respect to these practices." See, e.g., H.R. Rep. No. 493, 95th Cong., 1st Sess. 5 (1977), reprinted in EEOC Legislative History, at 438; 123 Cong. Rec. 34295 (October 19, 1977), reprinted in EEOC Legislative History, at 482. Existing law included an appellate decision expressly rejecting an attempt to put an age-related cost justification limitation on Section 4(f)(2). See Brennan v. Taft Broadcasting Co., 500 F.2d at 215-17.

Thus, the intent of Congress in 1978 was to amend § 4(f)(2) to prohibit involuntary retirement. The amendment of that section did no more. It did not either by its terms or effect engraft a cost justification requirement onto § 4(f)(2). It did not in any way prohibit benefit integration.

The Department of Labor and the EEOC Have Been Inconsistent with Their Interpretations of § 4(f)(2) By Not Always Requiring Age-Cost Justification

Supporters of the present proposals to amend the ADEA contend that legislation is necessary to recussitate the longstanding view of the administrative agencies that § 4(f)(2) is limited to age-cost justified distinctions. Again, history does not support this claim.

The initial 1968 ADEA interpretations did not even refer to § 4(f)(2). See 33 Fed. Reg. 9172-73 (1968). The first interpretations dealing with the subject were published by the

Department of Labor (DOL) on January 9, 1969, more than a year after the ADEA was enacted. See 34 Fed. Reg. 322-23 (1969). These interpretations stated (29 C.F.R. § 860.120) that:

> [a]n employer is not required to provide older workers who are otherwise protected by the law with the same pension, retirement or insurance benefits as he provides to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan. For example, an employer may provide lesser amounts of insurance coverage under a group insurance plan to older workers than he does to younger workers, where the plan is not a subterfuge to evade the purpose of the Act. A retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

While this interpretation offered a "safe-harbor" to any employer who could show that an age-based variance had a cost justification, it plainly did not interpret § 4(f)(2) as being limited only to such variances.

On June 21, 1969, the DOL published another set of interpretations. See 34 Fed. Reg. 9708-09 (1969). These interpretations merely added another administrative "safe-harbor":

> Further, an employer may provide varying benefits under a bona fide plan to employees within the age group protected by the Act, when such benefits are determined by a formula involving age and length of service requirements.

It is clear from the interpretation that § 4(f)(2) could apply to plans -- such as profit-sharing retirement plans -- that predicate age-based benefit variances on factors other than age-related costs:

> [W]here it is the essential purpose of a plan financed from profits to provide retirement benefits for employees, the exception may apply. The "bona fides" of such plans will be considered on the basis of all the particular facts and circumstances.

In 1979, the DOL promulgated an interpretative bulletin to implement the 1978 amendments to the ADEA, including the new prohibition on involuntary retirement. This bulletin, like the 1969 bulletin, was not a substantive regulation and did not have the force and effect of law. Rather, it was a statement of the positions that the DOL intended to take in court in enforcing the ADEA.

Specifically, the 1979 Bulletin stated that DOL understood the phrase "employee benefit plan" to refer to all plans providing "fringe benefits." See 44 Fed. Reg. 30648, 30658 (1979). It also stated -- for the first time -- that it would attempt to characterize as a "subterfuge" any benefit variance without an age-related cost justification. See id. Moreover, while it allowed for some exceptions, the 1979 bulletin generally adopted a benefit-by-benefit approach to cost justification, as opposed to a benefit package approach. See 44 Fed. Reg. at 30659. Obviously, the 1979 bulletin was a radical departure from the language of the statute, and went well beyond the "safe harbors" contained in the earlier administrative interpretations.

Responsibility for enforcing the ADEA was subsequently transferred to the EEOC. The EEOC adopted the Department of Labor's interpretive bulletin without making any changes -- but the bulletin remained an interpretation, not a regulation with the force and effect of law. Thus, the employer community was not legally bound to follow the Bulletin and, as it turned out, the EEOC declined to do so as well.

Specifically, notwithstanding the language of the 1979 bulletin (and the arguments of the proponents of S. 1511/S. 1293 that the interpretive bulletins have consistently required age-cost justified distinctions), the EEOC has recently taken the position that the cost justification theory set forth in the 1979 bulletin is not the exclusive test for determining whether a voluntary early retirement plan qualifies for protection under § 4(f)(2). When invited by the Second Circuit in Cipriano v. Board of Education, 785 F.2d 51 (2d Cir. 1986), to express its views on the application of § 4(f)(2) to early retirement incentive programs, the EEOC asserted that an employer need not show a strict age-related cost justification; rather the EEOC asserted that it was sufficient that the employer "demonstrate a legitimate business reason," such as an analysis of "increasing costs and/or declining benefit to the employer in providing the retirement incentives." "Memorandum of Law for the Equal Employment Opportunity Commission as Amicus Curiae," filed in Cipriano v. Board of Education, No. 84-CV-80C (W. D. N. Y.) at 31-33. The Commission took the position that early retirement incentive programs are lawful under § 4(f)(2) if all retirement-eligible employees are permitted to participate voluntarily in the plan and there is a legitimate business reason for structuring the plan with an age limitation. Cipriano v. Board of Education, 700 F. Supp. 1199, 1207-08 (W. D. N. Y. 1988).

Moreover, earlier this spring, in both his brief and oral argument to the Supreme Court in Betts, the Solicitor General conceded on behalf of the EEOC that § 4(f)(2) is not "absolutely limited to cost-based justifications" (Oral Arg. Tr. 43). Indeed, the Solicitor General admitted that § 4(f)(2) "allows employers to bar older employees from participating in employee benefit plans altogether where they [cannot] work for the employer long enough to qualify" (EEOC Brief at 19 n.11).

In short, the administrative agencies charged with enforcing the ADEA have embraced the age-related cost justification limitation for only part of the past 22-year period. It is neither the original interpretation nor the final interpretation. Thus, again contrary to the assumption in Section 2 of S. 1511/S. 1293, there is nothing "consistent" about the interpretations of the administrative agencies.

The Judicial Decisions Pre-Betts Have Been Inconsistent in Their Interpretation of § 4(f)(2)

The judicial decisions prior to Betts also reflect this confusion and inconsistency. They demonstrate that, contrary to the assertions of supporters of S. 1511/S. 1293, Betts did not upset settled law.

Early Decisions: Significantly, the first important decision after the promulgation of the 1979 bulletin implicitly rejected critical assumptions of that bulletin. In 1981, a unanimous Supreme Court, in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), held that the integration of benefits is permitted under ERISA, and, indeed, is central to the accomplishment of that statute's purposes. The Court found that, in ERISA, Congress had approved benefit integration and determined that prohibition of it would simply lead to the slowing down or elimination of benefit plans, and impair the funding of pension plans. Thus, as Justice Marshall stated for the Court, "the same Congressional purpose -- promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations -- underlies all such offset possibilities." Id. at 517. Although Alessi was not an ADEA case, it nevertheless is irreconcilable with S. 1511 limited acceptance of integration of benefits.

In 1982, the Fifth Circuit Court of Appeals in Alford v. City of Lubbock, 664 F.2d 1263 (5th Cir.), cert. denied, 456

U.S. 975 (1982), expressly repudiated another assumption of the 1979 Bulletin (and S. 1511/S. 1293): It invalidated the bulletin to the extent that it permitted exclusion of employees from a defined contribution plan only if the exclusion was justified on the basis of age-related cost considerations. In so doing, the Court upheld the complete exclusion from a defined contribution plan of employees over the age of 50. The Alford court reaffirmed the holding of an earlier Fifth Circuit case -- Brennan v. Taft Broadcasting Co., 500 F.2d 212 (1974) -- in which the court had rejected the age-related cost justification rule. As the Fifth Circuit noted in Alford, "Congress sought to avoid using [the ADEA] as the ground on which 'to fight' in Senator Javits' words, 'the pension battle'" (id. at 1270) -- a position later affirmed by the Supreme Court in Betts.

Later Decisions: Other courts also rejected, either explicitly or implicity, the age-related cost justification test of the Bulletin. See, e.g., Germann v. Levy, 553 F. Supp. 700 (ND Ill. 1982); EEOC v. Westinghouse Electric Corporation, 577 F. Supp. 1029, 1036 (D.N.J. 1982), rev'd, EEOC v. Westinghouse, supra. Indeed, it was not until December 1983 and January 1984 -- 16 years after the enactment of the ADEA -- that courts began to embrace the position of the pending legislation -- to wit, that age-based benefit reductions in employee benefits could be justified only by age-based cost considerations. See EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert.

denied, 469 U.S. 820 (1984); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); Significantly, however, even these decisions were tentative in their conclusions. See id. at 1396-97 (result might be different if benefit policy was an "integral part of a complex benefit scheme,").

The Courts Have Differed Over the Issue of Qualification of Plans Under § 4(f)(2)

In later cases, the courts agreed only to disagree. Thus, the courts have applied differing standards and tests to determine whether an employer's plan is exempt from the ADEA under § 4(f)(2). Whether analyzed in terms of the proper scope of the meaning of "employee benefit plan" or the meaning of "subterfuge," it is clear that there has been no uniform acceptance by the courts of the age-cost justification urged by the supporters H.R. 3200.

The "Plan" issue. Several courts have rejected the strict age-based cost standard adopted by the Third Circuit for establishing that a plan is an "employee benefit plan." I have already noted that Fifth Circuit did so in Alford and Taft Broadcasting. The Second Circuit has done so as well. In Cipriano v. Board of Education, supra, the Second Circuit rejected the plaintiff's argument that an early retirement incentive plan could only be justified by "actuarially significant cost reductions." 785 F.2d at 54. The Second Circuit reaffirmed its rejection of a strict age-based cost requirement in Potenze v. New York Shipping Ass'n, 804 F.2d 235 (2d Cir. 1986), in which the court upheld the defendant's guaranteed annual income plan that offset social security benefits from plan benefits for employees over 65, but not for those employees between the ages of 62 and 65. The court, quoting from Judge Friendly's opinion in Cipriano, noted that for determining whether a plan is a "bona fide employee benefit plan," "it is immaterial that a more nicely tailored plan [might have distributed the cost savings more evenly among various age groups.]" Id. at 238 (citing Cipriano, 785 F.2d at 55).

By contrast, a few other courts have joined the Third Circuit in accepting an age-based cost test. Most notably, the Sixth Circuit, in Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities, 848 F.2d 692 (1988), rev'd, 109 S. Ct. 2854 (1989), held that the employer's disability insurance plan violated the ADEA because, in some limited circumstances, employees who became disabled after age 60 would receive lower monthly benefits than employees who became disabled before age 60. The Sixth Circuit found that the benefits were not the type of benefits included within § 4(f)(2), and, quoting the Seventh Circuit, stated that, "where . . . the employer uses age . . . as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623(f)(2)]." Betts, 848 F.2d at 694

(quoting Karlen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir.), cert. denied, 108 S. Ct. 2038 (1988). See also EEOC v. Great Atlantic & Pacific Tea Co., 618 F. Supp. 115 (N.D. Ohio 1985); EEOC v. Babcock & Wilcox Co., 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987).

The "Subterfuge" Issue. Some courts have concentrated their attention on whether an employer's plan is a "subterfuge to evade the purposes" of the ADEA. The disagreement as to the proper standard or test extends to this analysis as well.

For example, the Second Circuit, in Cipriano, supra, refused to endorse the EEOC's guidelines on "subterfuge," which require employers to justify any age-based reductions in benefits by providing evidence of age-based cost considerations. Instead, the Second Circuit held that an employer can prove that its plan is not a subterfuge "by showing a legitimate business reason for structuring the plan as it did." Id. at 58.

Subsequently, in Potenze, supra, the Second Circuit reiterated that a plan is not a subterfuge simply because it is not the least restrictive plan available. 804 F.2d at 238. Such an interpretation would, according to the court, "operate to frustrate the purposes of the ADEA." Id. at 239. See also Cipriano v Board of Education, 700 F. Supp. 1199 (W.D.N.Y. 1988)(employer can lawfully offer an early retirement incentive plan if there is a "legitimate business reason" for structuring the plan with specific age limitations); EEOC v. Home Insurance

Co., 672 F.2d 252, 260 (2d Cir. 1982)(to prove absence of subterfuge, employer must prove the existence of "valid business reasons" for its action).

The Fourth Circuit and a Rhode Island District Court have similarly adopted a "business or economic purpose" test for determining whether a plan is a "subterfuge." See Crossland v. Charlotte Eye, Ear and Throat Hospital, 686 F.2d 208, 213 (4th Cir. 1982); Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I. 1988), appeal pending, No. 89-1180.

The Third Circuit, on the other hand, has accepted the EEOC's position. See EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988). In Mt. Lebanon, the Third Circuit rejected the Second Circuit's "legitimate business reason" test and held instead that, "to disprove subterfuge, an employer must demonstrate that it reduced benefits for older workers only to the extent required to achieve approximate equivalency in the cost of providing benefits to older and younger workers." 842 F.2d at 1491 n.9. In that case, the court found that the city had not proven that its long term disability plan that provided for termination of benefits to employees age sixty-two through sixty-eight was not a subterfuge. Although the city offered evidence in the form of affidavits from its insurer and the person who set up the disability plan that the cost of insuring against disability increased with age, the court found that such general cost data supplied by the insurance company was insufficient to meet the city's burden of proof. Instead, the court held that the employer must establish a nexus between the general data and the specific level of reductions set forth in the plan. Thus, according to the Third Circuit's view, the employer's burden of proving that the plan is not a subterfuge is very heavy indeed, and, in many cases, cannot be met by providing data supplied by the employer's insurer. This is a far cry from anything Congress possibly could have intended when it enacted § 4(f)(2).

Finally, at least three courts of appeals have rejected any test that would require an employer to establish an age-based cost justification or other business justification where the plan is a pre-Act plan. See EEOC v. State of Maine, 823 F.2d 542 (1st Cir. 1987), aff'd 655 F. Supp. 223 (D.Me. 1986); EEOC v. County of Orange, 837 F.2d 420 (9th Cir. 1988)(rejecting age-cost test for pre-Act plan, and noting that the court is not bound by the DOL/EEOC interpretative regulations); EEOC v. Cargill, Inc., 855 F.2d 420 (10th Cir. 1988)(no age-cost proof required in case of pre-Act plan); see also EEOC v. Fox Point Bayside School Dist., 772 F.2d 1294 (7th Cir. 1985); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980), cert. denied, 451 U.S. 986 (1981).

The Courts Have Also Disagreed About The Extent To Which § 4(f)(2) Permits The Integration of Benefits

The Third Circuit, in EEOC v. Westinghouse Electric Corp., 869 F.2d 696, supra, held that severance benefits and pension benefits cannot lawfully be integrated. The court reasoned that the severance benefit plans merely provided "fringe benefits" for the short term, while pension benefits were designed to provide long term financial support. See also EEOC v. USX Corp., supra.

Similarly, the Ninth Circuit and the District Courts for the Northern District of Ohio and the Eastern District of North Carolina have held that, on the facts of the particular cases under review, severance benefits had not lawfully been integrated with pension benefits. See EEOC v. Borden's, supra (no integration of severance and pension benefits where severance pay plan was negotiated one month prior to the plant closing and the pension, retirement and insurance plans were embodied in different documents); EEOC v. Great Atlantic & Pacific Tea Co., supra (no integration of severance and pension benefits plans where "adopted at different times and negotiated separately"); EEOC v. Babcock & Wilcox Co., 43 Fair Empl. Prac. Cas. (BNA) 736 (E.D.N.C. 1987) (same).

Other courts have recognized the laudable goals served by integration of benefits, and have endorsed the practice under either ERISA or the ADEA. See, e.g., Alessi v. Raybestos-Manhattan, supra; Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985) (rejecting challenge to provision of severance pay plan which limited severance benefits to employees who had deferred their pension eligibility); Parker

v. FNMA, 741 F.2d 975 (7th Cir. 1984)(rejecting challenge to policy which gave employees the choice between retiring or taking severance pay); EEOC v. Airline Pilots, 661 F.2d 90 (8th Cir. 1981) (integrated provisions of vacation benefits policy upheld against ADEA challenge); Arnold v. USPS, 863 F.2d 994 (D.C. Cir. 1988) (integrated provisions of seniority system upheld against ADEA challenge); Abenante v. Fulflex, supra (the integration of pension and severance benefits permissible under ADEA); EEOC v. Firestone Tire & Rubber Co., 650 F. Supp. 1561 (W.D. Tenn 1987)(approving of integration of pension and severance benefits); Khan v. Grotnes Metalforming Systems, 679 F. Supp. 751 (N.D. Ill. 1988) (no ADEA violation where enhanced early retirement benefits are given instead of severance pay).

The Use of Actuarial Present Values

One last area of judicial decision is worth mentioning, not so much because of the judicial disagreement in the area (as there is none), but because of the litigation position that the EEOC has taken there. In Abenante v. Fulflex, No. 87-0456-B (D.R.I. 1988), the EEOC claimed that the use of actuarial data in benefit calculations creates a *prima facie* violation of the ADEA, and that an employer cannot satisfy the age-based cost justification test where it has not incurred the same present cost for older employees as it had for younger employees (even if it eventually will do so). The district court rejected the

EEOC's challenge, holding that Congress could not possibly have intended "the ADEA to prohibit employers from using actuarial data in all separation pay and pension benefit plans." This decision is consistent with prior ADEA case law, which recognizes that, in contrast to Title VII's treatment of race and sex discrimination, Congress did not intend in the ADEA to bar all use of age as a decisionmaking criterion in employment decisions. See Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1985). The decision is also consistent with common sense: Use of actuarial data is essential to the provision of pensions and insurance, and the ADEA cannot sensibly be interpreted to prohibit its use or to preclude reference to present value calculations based on it.

Summary: This somewhat detailed outline of the pre-Betts case law on § 4(f)(2) illustrates that, contrary to the claims of the supporters of S. 1511/S. 1293, there has been very little agreement among the district courts and circuit courts as to what standards and tests govern the application of § 4(f)(2) of the ADEA. It also shows that there certainly has been no "consistent" standard from which the Supreme Court's Betts decision could have deviated. Finally, it demonstrates that the EEOC itself has not been consistent in its interpretation of § 4(f)2 -- sometimes arguing that age-cost justifications are always required and on other occasions recognizing that there can be other acceptable "legitimate business reasons" which justify age-based distinctions in benefits plans under § 4(f)(2).

The Supreme Court's Betts Decision Is a Correct Interpretation of § (f)(2)

It is against the backdrop of this divergent judicial opinion that the United States Supreme Court reached its decision in Betts. The Court's decision in that case, rather than departing from settled law, reconciled the case law and reaffirmed long-standing congressional policy.

In Betts, seven members of the Supreme Court -- who were nominated by four different administrations -- held that the EEOC's age-cost interpretations was supported by neither the text nor the language and legislative history of the ADEA. The Court, after an extensive examination of the language and legislative history of the ADEA, found that Congress intended only limited coverage of employee benefit plans when it enacted the ADEA in 1967. More extensive legislation regarding those plans was "left . . . for another day." Betts, 109 S. Ct. at 2866.

Thus, the Betts Court, in accordance with a number of lower courts, held that a plan need not be a retirement, pension or insurance plan in order to be an "employee benefit plan" under § 4(f)(2). And while the Court did not provide an opinion on the precise meaning of "employee benefit plan," it noted that even the EEOC's own guidelines, which define an "employee benefit plan" as one which provides "fringe benefits," suggests that an age-cost justification is not required. Id. at 2864.

Moreover, the Court's interpretation of subterfuge is consistent with both congressional intent and the Court's prior decisions. The Court in Betts thus held that, to prove that a plan is a subterfuge, the plaintiff must prove that the employer actually intended for the plan to discriminate in a "nonfringe-benefit" aspect of the employment relationship. Id. at 2866. In McMann, the Court's first decision on the subterfuge issue, the Court clearly stated that a finding of subterfuge includes a subjective intent. To this extent, Betts did not change the law, but rather reaffirmed what the lower courts and the EEOC had disregarded. Finally, the Court also reaffirmed McMann's holding that a pre-Act plan is not a subterfuge under § 4(f)(2) even if the plan is not supported by age-related cost considerations or other business justifications.

There Already Exists Extensive Protections For Employee Benefits Under ERISA And Specific Amendments to the ADEA

The proponents of S. 1511/S. 1293 similarly would have this Committee believe that § 4(f)(2) provides the only protection for older employees in the area of employee benefit plans -- another faulty premise. The most comprehensive law regulating employee benefit plans is, of course, ERISA. In ERISA, Congress has expressly prohibited employers from excluding employees from pension plans merely because those employees have attained a certain age. 29 U.S.C. § 1052(a)(2).

Moreover, Congress has also amended the ADEA to provide certain specific protection for employees under employee benefit plans. For example, in the 1978 amendment to the ADEA, Congress prohibited employers from using employee benefit plans to retire employees involuntarily because of their age. 29 U.S.C. § 623(f)(2). Furthermore, in a 1982 amendment to the ADEA, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and over as are offered to employees under age 65 notwithstanding any additional costs that might be incurred. 29 U.S.C. § 623(g). And, in a 1986 amendment to the ADEA, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. § 623(i). Indeed, the 1986 amendment is especially noteworthy because it expressly acknowledges the interface between ERISA and the ADEA, and requires that they be interpreted consistently by the EEOC, DOL, and IRS.

Finally, the marketplace, through collective bargaining and other processes, also provides substantial protection to the employee benefits of older workers. Thus, the Supreme Court in _Alessi_, _supra_, recognized the importance of the market and collective bargaining when it held that ERISA pre-empted a state law prohibiting the offset of workers' compensation benefits against retirement pension benefits. And the courts have further recognized that labor unions are not precluded from trading off benefits in the negotiation of collective bargaining agreements. *See*, *e.g.*, *Anderson v. Ideal Basic Industries*, 804 F.2d 950 (6th Cir. 1986)(union did not breach duty of fair representation when it negotiated a closedown agreement with company which provided for assured employment for employees, vested pension for hourly employees, and pro-rata vacation pay, but but did not negotiate discontinuation benefits for employees); *Chesser v. Babcock & Wilcox*, 753 F.2d 1570 (11th Cir.) *cert. denied sub nom*. 474 U.S. 836 (1987) (duty of fair representation not violated by trade-off of layoff and vacation benefits). There is certainly no basis for assuming that the Supreme Court's decision in *Betts* will result in any changes to existing employee benefit plans that would adversely affect the interests of older workers.

The Impact of the Betts Decision.

Thus, far from being the overreaching miscreant that upset clearly established law, the *Betts* decision resolved much of the chaos that resulted from *inconsistent* administrative and judicial interpretations of the 1970s and 80s. It did so not by judicial activism, as its critics have charged, but by examining and giving effect to the intent of the Congress that passed the ADEA, and the purposes Congress sought to achieve.

As a result, it is now clearly legal for employers to do what they consistently have done. They may integrate their retirement benefits with other employee benefits and with public entitlements so that the limited resources allocable to benefits can be used to protect the greatest number of employees. They can continue to provide for early retirements and may offer early retirement incentive programs to employees in an effort to resolve in a humane way the problems associated with the need to downsize in response to economic conditions. They may employ actuarially driven factors to assure -- to the extent humanly possible -- that benefits promised to last an employee's lifetime will have been sufficiently funded to do so.

By contrast, were this legislation to become law, employers would be required to duplicate benefits by providing severance or disability "contingency benefit" payments in addition to generous retirement benefits. This would result in either a reduction in future increases in pension benefits or a reduction in the amount of severance or disability benefits to all workers. The legislation could also be interpreted to disapprove of some uses of actuarial data, contrary to sound and necessary benefit practice; if so, it would disrupt numerous pension and insurance programs. Finally, the legislation would also appear to require an employer to provide the same early retirement benefit to each employee, regardless of age. The dissipation of the limited resources available in situations in which early retirement programs are most likely to be offered to a large segment of the workforce would make such a program uneconomical. The incentive might have to be so low that it would not provide the necessary incentive. If the program failed as a result, involuntary layoffs may be the only alternative available.

If the cost-justification method is adopted as the exclusive method of justifying age differentials in benefit plans, and if benefit integration and use of actuarial data is limited or eliminated, employers will be required to shift benefit dollars at the expense of older workers. Because employers have but a limited amount of resources available to spend on employee benefits, the price of legislation will be paid in large by older workers -- either by a loss of existing benefits (e.g., severance pay) or a reduction in future benefits (e.g., pensions).

This will also result in an increase in the cost of hiring and retaining older workers. In 1967, the drafters of the ADEA feared that the cost of benefits for older workers would act as a disincentive to employ them. For this reason, they exempted employee benefit plans. This legislation creates even greater disincentives than the drafters could have imagined, and could cause their fears to be realized.

Finally, all of the problems of this legislation are only compounded by the provision making it retroactive. Given the conflicting interpretations that existed prior to Betts, discussed in detail above, it is astounding that this bill would seek retroactively to reverse decisions affected by Betts and to render unlawful actions and practices that existed prior to the enactment of the legislation. To attempt to do so is fundamentally unfair and constitutionally suspect.

Because the present bill would add new liabilities for pension plans which could not have been anticipated in their funding, retroactive application is particularly inappropriate. The Supreme Court has refused to impose such unforeseen liabilities retroactively recognizing that they could have a devastating effect on pension plans and force current or future beneficiaries to shoulder the burden of the extra costs. City of Los Angeles, Department of Water and Power v. Manhart, 435 U.S. 702, 722 (1978).

Conclusion

In conclusion, S. 1511/S. 1293 proceeds from a flawed premise. The proposed legislation neither comports with nor restores the original intent of Congress in enacting the ADEA. There has been no consistency in agency interpretation of § 4(f)(2). And the courts have never spoken with one voice in construing this section. The bill, if enacted, would place in jeopardy both generally accepted benefit plan designs and practices that were based on actuarial assumptions and widely used coordinated benefit programs, many of which have resulted from collective bargaining. It would also result in the elimination of many early retirement programs. Thus, the older workers that we all want to protect would be best served by the defeat of S. 1511/S. 1293.

APPENDIX A

DESCRIPTION OF GROUPS PRESENTED

Association of Private Pension and Welfare Plans

The Association of Private Pension and Welfare Plans ("the APPWP") is a private, non-profit organization whose primary purpose is to protect and foster the growth of this country's private pension and employee benefit system. The APPWP was founded in 1967, and has grown since that time to represent hundreds of plan sponsors, both large and small, as well as plan support organizations such as actuarial and benefit consulting firms, investment firms, banks, insurance companies, accounting firms, and other professional benefit organizations. Collectively, the APPWP's members have substantial experience in the entire spectrum of issues relating to all types of benefit plans. APPWP members either sponsor plans themselves or provide assistance to more than 70,000 benefit plans; these plans collectively cover tens of millions of employees.

National Association of Manufacturers

The National Association of Manufacturers ("NAM") is a voluntary business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85 percent of all workers in manufacturing and produce more than 80 precent of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Associations Council and the National Industrial Council.

Chamber of Commerce of the United States

The Chamber of Commerce of the United States ("the Chamber") is the world's largest federation of business companies and associations. It represents approximately 180,000 businesses of every type throughout the country, plus several thousand organizations and trade associations.

ERISA Industry Committee

The ERISA Industry Committee ("ERIC") is an association of more than 120 of the nation's largest employers. ERIC's members provide a wide variety of employee benefits under a multitude of broad-based employee benefit plans. These plans provide such benefits as health and life insurance, disability income, sick pay, severance pay, and retirement income. Employer-sponsored plans have been remarkably successful in efficiently allocating limited employer resources to meet the important and diverse needs of a large and heterogeneous workforce. More than 25 million Americans are covered by ERIC's members' plans. Many of these plans are maintained pursuant to collective-bargaining agreements.

Senator **Metzenbaum**. Mr. Chris Mackaronis, representing Bell, Boyd & Lloyd of Washington, DC.

Happy to have you with us, sir.

Mr. **Mackaronis**. Thank you very much, Mr. Chairman. Good morning and good morning to the other members of the committee.

My name is Christopher Mackaronis. For more than 10 years now I have been actively engaged in the practice of law, principally focusing on the Age Discrimination in Employment Act, and with particular emphasis on employee benefits under section 4(f)(2), the provision which was interpreted by the court in *Betts* and which the Congress is now considering modifying.

I learned my trade as a staff attorney with the Equal Employment Opportunity Commission, where from 1979 through 1985 I was a senior staff attorney with responsibility for age discrimination regulations and policy development. Since that time I have been the manager of advocacy programs with the American Association of Retired Persons, and I am now a partner in the Washington, DC, office of the firm of Bell, Boyd & Lloyd.

I participated in numerous lawsuits under section 4(f)(2) and have actively been involved in litigating several early retirement incentive cases as well.

I have only a few points to make this morning. I don't want to duplicate what the other witnesses have said.

First, Mr. Chairman, let me point out that I think *Betts* clearly is an extremely ominous decision for all older workers.

I think, as Senator Glenn indicated, and correctly so, not only is *Betts* a tragedy for cases which now may be lost as a result of its incorrect reasoning, but it also portends horribly for older workers in the future. I think it would be extremely naive to cast aside the strong temptation which *Betts* provides all employers to reduce employee benefits for older workers when faced with the need to cut costs.

As we have seen in the area of health insurance for retirees, cost concerns inevitably will result in the chipping away at these fundamental benefits as a form of compensation for older workers unless Congress takes action.

Ironically, of course, it was costs that caused section 4(f)(2) to be implemented in the first instance. Senator Jacob Javits at the time, in 1967, introduced section 4(f)(2) to make sure that the law did not unduly impair an employer's ability to hire and retain older workers while at the same time ensuring that older workers were not the subjects of arbitrary discrimination. That win-win proposition—a win for older workers because they were protected, and a win for employers because they were protected from undue costs—has been cast aside by *Betts* and now runs the risk of jeopardizing the benefit entitlement of all older workers.

Both S. 1511 and S. 1293 I think would restore the careful balance that was first implemented by Senator Javits and that for 20 years has been represented by the equal benefit or equal cost principle.

Nevertheless, several concerns have been raised by critics of both of these bills, and I would like to address two of them.

First, with regard to early retirement incentive benefits, there has been substantial, and I believe unfounded, criticism that the bill as written, either S. 1293 or S. 1511, would unduly impair an employer's ability to offer retirement incentives.

To explain my point I would like to approach the easel.

The allegation that early retirements will be outlawed under the new legislation, either S. 1511 or S. 1293, I think is unfounded. This chart represents lawful early retirement incentive benefits. There is a provision here pre-*Betts* and under S. 1511. And assume for these purposes that S. 1511 also includes S. 1293.

A flat dollar amount, a nonpension benefit, $10,000 to all employees, that was lawful before *Betts* and would be lawful now.

Another form of nonpension benefits, service-based, $1000 for each year of service if you want to retire early, that was lawful before *Betts*. That would be lawful now or lawful under the legislation.

A percentage of salary, 50 percent of your salary to encourage you to leave. That was lawful before *Betts*. There is nothing in the legislation which would impair an employer's ability to do that either.

Retiree health, same thing. Lawful before *Betts*, lawful after.

On a pension plan, these three other types of benefits also are lawful. Imputed service, assume you have 5 more years of credit to retire, that's fine under *Betts*, it's fine now.

Likewise with the other two benefits. I won't put my little red dots on them. Percentage increases, that would be okay. And a flat dollar amount is okay.

Now, the question that arises, of course, with all these options lawful before and after, what is it that the EEOC and some opponents of the bill want in terms of retirement incentives. Why do they suggest that there is a need to have something in the bill that exempts early retirement incentives? This is what they want to make lawful, and it should be on the table so Congress can accurately assess it. They want to make an age-based denial of an incentive lawful.

Now, the EEOC says that the regulations don't apply to early retirement and that the voluntary is different. Well, that is not what the regulations say. Understand that the EEOC counsel in the *Cipriano* case said the regulations apply. And also understand that in the Seventh Circuit in the *Carlin* case their regulations were upheld as applied to a retirement incentive program.

And in just finishing, let me show you in terms of a voluntary, they say if it's voluntary it's okay. Well, what does that mean? What they mean is that if you're 55 to 60 and you miss the opportunity, then it's okay to discriminate against you later on.

Well, in the *Cipriano* case they filed the brief the appellate court said that was totally irrelevant. I am not quite sure why they filed the brief.

Senator **Metzenbaum**. Mr. Mackaronis, I cannot permit you to go on. It would be unfair to the other witnesses.

Mr. **Mackaronis**. That's fine.

Senator **Metzenbaum**. Thank you very much.

Mr. **Mackaronis**. Thank you.

Senator **Metzenbaum**. If you want now to submit your written testimony, of course we would be glad to have you do so.

Mr. **Mackaronis**. I appreciate it, Senator. Thank you.

[The prepared statement of Mr. Mackaronis follows:]

PREPARED STATEMENT OF CHRISTOPHER MACKARONIS

I. INTRODUCTION

Good morning Mr. Chairman. My name is Christopher Mackaronis. I appreciate the opportunity to testify before the Senate Special Committee on Aging and the Subcommittee on Labor of the Senate Education and Labor Committee.

For more than ten years, the vast majority of my legal practice has involved the Age Discrimination in Employment Act of 1967, "ADEA", with particular emphasis on the exception for employee benefit plans set forth in § 4(f)(2) of the Act. From 1979 through 1985, I was the Senior Staff Attorney in the Office of Legal Counsel at the Equal Employment Opportunity Commission (EEOC), with primary responsibility for ADEA regulations and policy development. In that regard, I was responsible for the review and development of all the interpretations and regulations which were in effect at the time jurisdiction over the ADEA was transferred from the Department of Labor to the Equal Employment Opportunity Commission on July 1, 1979. From March 1985 through August 1989, I was the Manager of Advocacy Programs in the Worker Equity Department at the American Association of Retired Persons (AARP). I am currently a partner in the Washington, D.C. office of the Chicago law firm of Bell, Boyd & Lloyd.

I have been involved in numerous lawsuits under the ADEA involving the § 4(f)(2) affirmative defense. Specifically, I have been involved in Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989); EEOC v. Westinghouse Electric Corp., 869 F. 2d 696 (3d Cir. 1989); EEOC v. Cargill, Inc., 855 F.2d 682 (10th Cir. 1988); Britt v. E.I. du Pont de Nemours & Co., Inc., 768 F. 2d 593 (4th Cir. 1985);

Karlen v. City of Colleges of Chicago, 837 F. 2d 314 (7th Cir. 1988); Von Aulock v. Smith, 720 F. 2d 176 (D.C. Cir. 1983); American Ass'n of Retired Persons v. EEOC, 823 F. 2d 600 (D.C. Cir. 1987); American Ass'n of Retired Persons v. Farmers Group, Inc., 10 E.B.C. [BNA] 1121 (C.D. Cal. 1988); Abenante, et al. v. Fulflex, Inc., 48 Fair Employ. Prac. [BNA] Cases 918 (D.R.I. 1988), appeal pending, No. 89-1179 (1st Cir.); and Mitchell v. Mobil Oil Corp., appeal pending, No. 89-1019 (10th Cir.). Moreover, I have in the past or am currently representing plaintiffs in the litigation of the following early retirement incentive cases under the ADEA: Cipriano v. Board of Education of North Tonawanda, 785 F. 2d 51 (2d Cir. 1986), on remand, 700 F. Supp. 1199 (W.D.N.Y. 1988); Paolillo v. Dresser Industries; 865 F. 2d. 37 (2d cir. 1989), and AARP, et al., v. E.I. duPont de Nemours & Co., Inc., No. 86-6866 (E.D.Pa.).

In my testimony today, I will attempt to focus on the effects of the Supreme Court's decision in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), and the manner in which the "Older Workers Benefit Protection Act," S. 1511, would effect the pre-Betts law under the ADEA regarding employee benefit plans.

II. Public Employees Retirement System of Ohio v. Betts

In Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), the Supreme Court substantially changed a variety of settled interpretations of the ADEA regarding employee benefit plans. As a result of Betts, employers will undoubtedly argue that they have far greater latitude than ever before to discriminate in the terms and conditions of virtually all forms of employee benefits.

First, the Court concluded in Betts that the phrase "compensation, terms, conditions, or privileges of employment" set forth in § 4(a)(1) of the ADEA does not encompass employee benefit plans.[1] The Court stated that to conclude otherwise "would in effect render the § 4(f)(2) exemption nugatory with respect to post-Act plans." 109 S.Ct. at 2866.[2] The Court's conclusion in this regard is remarkably unlike its interpretations of virtually identical language in Title VII of the Civil Rights Act of 1964. Under Title VII, the Court has not hesitated to rule that the comparable provision, § 703(a)(1), encompasses the type of employee benefits challenged in Betts. See e.g., Arizona Governing Committee v. Norris, 463 U.S. 1073, 1079 (1983); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978).

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[1] Section 4(a)(1) of the ADEA reads as follows:

> It shall be unlawful for an employer -- (1) to fail or refuse to hire or discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;...

29 U.S.C. § 623(a)(1).

[2] Section 4 (f)(2) of the ADEA states that it shall not be unlawful:

> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan which is not a subterfuge to evade the purposes of this act...

29 U.S.C. §623 (f)(2).

Second, the Court ruled that § 4(i)(2) provides a broad exemption for employee benefit plans under "the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship...." 109 S.Ct. at 2866. In effect, the Court ruled that in addition to demonstrating disparate employee benefits, in order to establish a violation of the ADEA a plaintiff would also have to demonstrate some other form of discrimination in the "non-fringe benefit aspects of employment" in order to establish a violation of the ADEA. This new formulation of the plaintiff's burden in an employee benefits case -- benefits discrimination plus non-fringe benefits discrimination -- is inconsistent with the standards previously applied by all the courts of appeals in addressing benefits discrimination issues under the ADEA[3/].

[3/] See e.g. Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692 (6th Cir. 1988); EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988); Cipriano v. Board of Education of North Tonawanda School District, 785 F.2d 51 (2d Cir. 1986); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Bordens
(footnote continued)

Third, the Court rejected regulations, in effect since 1969, which imposed a "cost justification requirement" to benefit reductions under the § 4(f)(2) defense. The dual predicate for the Court's rejection of these regulations was the Court's conclusion that they were "contrary to the plain language of the statute," 109 S.Ct. at 2865, and that "the cost justification requirement was not adopted contemporaneously with the enactment of the ADEA." 109 S.Ct. at 2863. With regard to the latter conclusion, the Court held that although the "cost justification" first appeared in 1969, subsequent regulations impermissibly narrowed what had previously been "a non-exclusive objective test for employers" to an exclusive cost-based analysis. 109 S.Ct. at 2863.

Finally, the Court in Betts rejected the unanimous judgment of the courts of appeals that § 4(f)(2) constituted an affirmative defense, a defense for which the employer bore the burden of proof. The Court ruled that "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship." 109 S.Ct. at 2868.

Needless to say, the holding in Betts substantially alters the legal burdens under which plaintiffs can pursue allegations of discrimination in employee benefit plans under the

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Inc., 724 F.2d 1390 (9th Cir. 1984); Mason v. Lister, 562 F.2d 343 (5th Cir. 1977).

ADEA. Numerous cases currently on file could be adversely affected by Betts. In fact, as Justice Marshall noted in his dissent, even in pending cases where the employer's only explanation for discriminatory benefit design is "his abject hostility to, or his unfounded stereotypes of [older workers]," 109 S. Ct. at 2869 (Marshall, J. dissenting), the employer may prevail unless the employee can demonstrate that the discriminatory plan design was intended to cause some other nonfringe-benefit discrimination.

While the effect of Betts on pending cases is, in the long run, quantifiable, it will also have secondary effects which are far less measurable. If the standards set forth by the Court in Betts are allowed to remain in effect, Congress should anticipate the elimination of almost all employee benefit litigation under the ADEA. Under the Court's "benefits discrimination plus" formulation, prudent counsel will be forced to search for direct evidence of an employer's "intent" to discriminate in a nonfringe-benefit aspect of employment prior to instituting litigation. As all seasoned practitioners know, however, it is precisely these forms of direct evidence, i.e., "smoking guns", that are most difficult to find. It would be the rare employer who announces his intention to use benefits discrimination as a means of accomplishing some other unlawful objectives. Ironically, under the Court's formulation in Betts, all the employer need announce is that he has specifically targeted older workers for cost savings under any benefit programs.

Ultimately, the result reached by the Court in Betts was neither mandated by the plain language of the statute nor its legislative history. For more than twenty years, the agencies responsible for enforcing the ADEA have fashioned (and maintained) interpretative regulations which effectively protected both employers and employees in the field of employee benefits. Employees were protected because they could not be singled out as targets of arbitrary discrimination. Likewise, employers were protected by not having to incur undue expense on behalf of older workers, a result which would have discouraged both their hiring and retention. By incorporating this long-standing regulatory concept into the ADEA, S.1511 would restore both fairness and predictability to the whole range of employee benefits under the ADEA. S.1511 would fulfill the long-standing expectations of older workers, while at the same time permitting employers to design benefits programs that would accomplish legitimate business objectives.

III. THE ADEA LEGISLATIVE HISTORY ON EMPLOYEE BENEFIT PLANS

When read together, both the 1967 and 1978 legislative history to the ADEA reflect congressional intent to fashion a limited exception for discrimination in employee benefit plans which is justified by age-related costs for benefits.

A. The 1967 Legislative History

Contrary to the holding of the Court in Betts, the 1967 legislative history of the ADEA cannot be read to reflect an intent to create a wholesale exemption from the Act for all employee benefit plans and all forms of discrimination thereunder. Another interpretation, one which protects employees from arbitrary discrimination and employers from undue expense, is more plausible, particularly in light of subsequent legislative history to the ADEA. Indeed, the 1967 legislative history demonstrates that the exception for employee benefit plans was the result of congressional preoccupation with two related issues -- pension plans and excessive employer expense.

During consideration of the ADEA in 1967, Congress acknowledged that the cost of providing certain benefits to newly-hired older workers can be higher than providing the same benefits to younger workers. The Administration's bill (S.830), however, contained no provisions for the observance of bona fide employee benefit plans. Senator Jacob Javits recognized that this might actually encourage employers not to hire older workers who would have to be included in pension plans and provided with full benefits:

> It [the administration's bill] does not provide any flexibility in the amount of pension benefits payable to older workers depending on their age when hired, and thus may actually encourage employers, faced with the necessity of paying greatly increased premiums, to look for

> excuses not to hire older workers when they might have hired them under a law granting them a degree of flexibility with respect to such matters.

Hearings on S.830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967) (Emphasis added.) Senator Javits proposed the amendment which became § 4(f)(2)[4/] in order to provide employers with the "flexibility" to make necessary distinctions based on age and thereby to ensure that employers would not be "discouraged from hiring older workers because of the increased costs associated with providing benefits to them." S. Rep. No. 723, 90th Cong., 1st Sess. 14, reprinted in Legislative History at 118; Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967); see also EEOC v. Borden's, Inc., 724 F.2d at 1396. Senator Javits explained:

> The meaning of this [§4(f) (2)] provision is as follows: An employer will not be compelled under this section to afford to older workers exactly the same pension, retirement, or insurance benefits as he affords to younger workers.

113 Cong. Rec. 31255 (November 6,1967), reprinted in Legislative History at 146 (emphasis supplied).[5/]

[4/] 113 Cong. Rec. 7076 (March 16,1967), reprinted in Legislative History at 71.

[5/] See also S. Rep., No. 723, 90th Cong., 1st Sess. 4 (1967) ("This exception serves to emphasize the primary purpose of the bill---hiring if older workers---without necessarily including such workers in employee benefit plans."); remarks of Senator Yarborough (amendment will not deny older workers employment but
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Despite these specific legislative concerns, however, the Court in Betts chose to rely on isolated references to permissible "exclusions" to effectively exempt all employee benefits from coverage. See 109 S.Ct. at 2867. The Court's reading unnecessarily broadened the statutory exception.

First, the 1967 discussions concerning exclusions uniformly pertained to plans which excluded employees from participation at the date of hire, not to plans like the one challenged in Betts, which exclude all employees based on age, regardless of service. There is not a shred of legislative history showing that Congress intended to permit employers to deprive long-service employees of benefits upon the attainment of an arbitrary age.

Second, mention in 1967 of exclusions from employee benefit plans clearly pertained to pension plans. Indeed, those references manifest congressional intent not to force employers to include in a pension plan newly hired older workers who could not possibly meet the vesting requirements of those plans and whose inclusion would unduly disrupt the actuarial and cost expectations under which the plans operated. See Remarks of Senator Yarborough, 113 Cong. Rec. 31255 (1967), reprinted in

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will "limit [their] rights to obtain full consideration" in benefit plans) 113 Cong. Rec. 31255 (November 6,1967), reprinted in Legislative History at 146 (emphasis supplied); remarks of Representative Daniels (§4(f)(2) "is designed to maximize employment possibilities without working an undue hardship on employers in providing special and costly benefits.") 113 Cong. Rec. 34746 (December 4, 1967), reprinted in Legislative History at 157 (emphasis added).

Legislative History at 146; see also Alford v. City of Lubbock, 604 F.2d 1263, 1270 (5th Cir.), cert. denied, 456 U.S. 975 (1982).

Furthermore, the exclusions referred to in the 1967 legislative history were later narrowly drawn by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1052(a)(1)(B) (employees can only be excluded from defined benefit pension plans, and then only if hired within five years of the normal retirement age in the plan). The limited exclusions in ERISA were adopted by regulation to apply all employers covered by the ADEA, 29 C.F.R. §860.120 (f)(1)(iv)(A) (1979). In 1986, Congress amended the ADEA and ERISA to prohibit, inter alia, the exclusion of any employee from a pension plan based on age at date of hire. See Pub. L. No. 99-509, § 9203(a), 100 Stat. 1979 and H.R. Conf. Rep. No. 1012, 99th Cong., 1st Sess. 379 (1986) (overall objectives of these amendments is to assure that employee benefit plans do not discriminate on the basis of age).

Ultimately, the Court's holding in Betts undermined rather than furthered the purposes of the ADEA. While sparing employers from the "undue expense" about which Congress was concerned, the Court has excused employers from incurring any expense at all, a result which promotes precisely those forms of arbitrary discrimination the statute was designed to eliminate. See 29 U.S.C. §621 (b) ("It is therefore the purpose of this Act...to prohibit arbitrary age discrimination in employment").

Not only is this result inconsistent with the 1967 legislative history, it also flatly contradicts the unanimous and unequivocal expressions of congressional intent in 1978.

B. The 1978 Legislative History

In passing the 1978 amendments to the ADEA, Congress dispelled any doubt about whether a "cost Justification" was required to satisfy the standards of §4(f)(2). Managers of the 1978 amendments and other members of Congress repeatedly and specifically endorsed the understanding that §4(f)(2) sanctioned only those forms of discrimination in benefits that were justified by age-related costs. Senator Javits, while addressing the proposed amendment of §4(f)(2), reaffirmed his original intent in proposing §4(f)(2):

> The purpose of § 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers.
>
> Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

124 Cong. Rec. 8218 (March 23,1978), reprinted in Legislative History at 539 (emphasis supplied); see remarks of Senator Williams, Majority Manager of ADEA amendments ("[Javits] statements are consistent with the position taken by the Department of Labor regarding these matters.") Id.; See also remarks of Senator Williams ("§ 4(f)(2) was intended to permit...varying coverage of workers in different age groups to reflect those [cost] differences so long as they are based on valid assumptions...") 123 Cong. Rec. 34295 (October 19,1977), reprinted in Legislative History at 482.

The statements of managers and other legislators from the House confirmed that § 4(f)(2) authorizes only reductions in benefits necessitated by costs. Remarks of Rep. Hawkins ("the purpose of § 4(f)(2) is to encourage the employment of older workers by permitting age-based variations in benefits where the cost of providing benefits to older workers is substantially higher.") 124 Cong. Rec. 7881 (March 21, 1978), reprinted in Legislative History at 528. Furthermore, they noted that the exception does not authorize precisely the type of total cutoff of benefits challenged in Betts. Remarks of Rep. Weiss ("it is not the intention of this amendment to have older workers cut off from their health and benefit plans the day they reach age 65...[employers] should not interpret the 1977 (sic) amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees.") 124 Cong. Rec. 7887 (March 21, 1978), reprinted in Legislative History at 534.

This overwhelming (and uncontradicted) body of congressional commentary delimiting the requirements of §4(f)(2) was disregarded by the Court in Betts, however, on the grounds that the 1978 Congress did not amend the "subterfuge" proviso. See 109 S.Ct. at 2861. Regardless of the merits of that holding,[6] it would have been extraordinary for Congress to amend a provision in 1978 which for almost ten years had been defined by the enforcing agency in a manner consistent with Congressional intent. In fact, the 1978 Legislative history to the ADEA reflects uniform agreement with the "equal benefit or equal cost" principle set forth in the Department of Labor's 1969 interpretation of § 4(f)(2).

IV. THE "EQUAL BENEFIT OR EQUAL COST" PRINCIPLE

A. The 1969 Department of Labor Interpretation

Shortly after passage of the ADEA, the Department of Labor, which then had responsibility for enforcement of the ADEA, interpreted the "subterfuge" provision of § 4(f)(2) to permit age-based differences in employee benefits where justified by valid cost considerations. This 1969 interpretation articulated an "equal benefit or equal cost" principle as follows:

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[6] As the Court noted in Betts, the 1978 amendments added language to §4(f)(2) specifically prohibiting involuntary retirements while several Congressmen, including Senator Javits, made it clear that Congress specifically disagreed with the holding and reasoning of the Court in McMann. 109 S. Ct. at 2861 citing 124 Cong. Rec. 8219 (1978) reprinted in Legislative History at 519.

> A retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage.

29 C.F.R. § 860.120 (a), 34 Fed. Reg. 9709 (June 21, 1969); See EEOC v. Borden's, Inc., 724 F.2d at 1396. As a contemporaneous construction of the statute by the enforcement agency, the "equal benefit or equal cost" principle was entitled to great deference by the courts. EEOC v. Associated Dry Goods Corp., 449 U.S. 590, 600 n.17 (1981); Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 210 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); United States v. Jackson, 280 U.S. 183, 196-97 (1930). Significantly, not one of dozens of formal opinion letters issued by the DOL between 1969 and 1978 ever deviated from the "equal cost" approach to a claim of discrimination in employee benefits.

B. The 1979 Interpretative Bulletin

The Senate Report accompanying the 1978 amendments (the first amendments to § 4(f)(2) since passage of the Act) implicitly embraced the existing "equal cost' interpretation of § 4(f)(2) by declaring:

> This bill would not alter existing law with respect to these practices. Existing principles of law, including the 4(f)(2) bona fide employee benefit plan exception, as modified by these amendments, would be the standard by which these practices will be evaluated.

S. Rep. No. 493, 95th Cong., 1st Sess. 5, reprinted in Legislative History at 438. Perhaps more to the point, the bill's managers in both the House and Senate and other legislators specifically recited the "equal cost" standard with approval as the proper interpretation of § 4(f)(2). See ante at 12-13.

After the passage of the 1978 amendments, the Department of Labor responded to congressional requests for more comprehensive guidance regarding § 4(f)(2)[7] by issuing an amendment to its Interpretative Bulletin on Employee Benefit Plans, 29 C.F.R. § 860.120, 44 Fed. Reg. 30648 (May 25,1979). The amendment, which specifically relied on the extensive 1978 legislative history, continued in effect the "equal benefit or equal cost" principle previously enunciated by the Department and endorsed by Congress. [8] The detailed regulation and the accompanying explanatory material made several relevant points absolutely clear.[9] First, while the regulation provided an in-depth discussion of four of the most common types of employee benefit plans---group term life insurance, group health insurance, long-term disability, and retirement plans (29 C.F.R. §§860.120(f)(2) (i)-(iv)), it was patently clear that the "equal benefit or equal cost" principle applied to all employee benefit plans covered by § 4(f)(2).[10]

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[7] See remarks of Rep. Hawkins, 124 Cong. Rec. 7881 (March 21,1978) reprinted in Legislative History at 529; remarks of Senators Williams and Javits, 124 Cong. Rec. 8219 (March 23,1978) reprinted in Legislative History at 540 ("[t]he Department of Labor intends to promulgate comprehensive regulations in order to provide guidance in this regard for sponsors of employee benefit plans, and the Secretary is urged to act as soon as possible").

[8] The amendment to the Interpretative Bulletin provided:

> The legislative history of this provision indicates

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> that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations...where employee benefit plans do meet the criteria in section 4(f)(2), benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker even though the older worker may thereby receive a lesser amount of benefits or insurance coverage. 29 C.F.R. § 860.120(a)(1).

[9] Effective July 1, 1979, Congress transferred enforcement authority over the ADEA from the Department of Labor to the EEOC. Reorg. Plan No. 1 of 1978, 3 C.F.R. § 321 (1978), reprinted in, 92 Stat. 3781 (1978). The relevant DOL regulations were not changed by the EEOC. The were continued in effect by the EEOC in 1979, 44 Fed. Reg. 37974 (June 29,1979), and were recodified at 29 C.F.R. § 1625.10, 52 Fed. Reg. 23811 (June 25,1987).

[10] See 29 C.F.R. § 860.120 (a)(1) ("where employee benefit plans do meet the criteria in section 4(f)(2)...") (emphasis added); (A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred... is equal...") (emphasis added); see also 44 Fed. Reg. 30653 (Although not specifically discussed herein, other plans within section 4(f)(2), such as short term disability and accidental death and dismemberment are subject to the same general principles") (emphasis added).

Second, the regulations reaffirmed the intent of the original "equal benefit or equal cost" principle by specifying that the only cost relevant to the issue of "subterfuge" was the cost of the challenged benefit. Under a heading entitled "Subterfuge" the regulations stated:

> (1) Cost data - General. Cost data used in justification of a benefit plan which provides lower benefits to older employees on account of age must be valid and reasonable. This standard is met where an employer has cost data which show the actual cost to it of providing the particular benefit (or benefits) in question over a representative period of years.

29 C.F.R. § 860.120 (d)(1) (emphasis added); see also 44 Fed. Reg. 30653 (May 25, 1979) ("Under the benfit-by-benefit approach, as outlined above, reductions in the level of one benefit -- such as group term life insurance --must be justified by an increase in the cost of that particular benefit, regardless of any adjustment in the levels of other benefits.") (Emphasis added).

Third, the regulations declared only "one exception to the otherwise uniform rule under § 4(f)(2) that age-based reductions in employee benefit plans must be justified by actuarially significant cost considerations." 44 Fed. Reg. 30649; see 29 C.F.R. §§ 860.120(f)(1)(iv)(B)(1)-(7) (1979). That exception, which interpreted the ADEA to permit employers to incur no pension costs for certain employees, has since been legislatively rescinded. Section 4(i) of the ADEA, Pub. L. No. 99-509, § 9201.

Despite the almost verbatim continuity between the 1969 interpretation and its 1979 progeny, the Court in Betts held that the "original version of the cost-justification rule was nothing more than a safe-harbor" which, in 1979, was impermissibly transformed into the "exclusive means of escaping classification as a subterfuge." 109 S.Ct. at 2863. While this fundamental change did not affect the treatment of discrimination in employee benefits, it accurately reflected the fact that a whole genre of § 4(f)(2) cases --those involving allegations of involuntarily retirement --had been eliminated by the 1978 amendments.

Up until 1978, there were two generic types of cases to which § 4(f)(2) applied. The exception applied to traditional claims of discrimination in employee benefits. The exception also applied to claims of involuntarily retirement pursuant to a "bona fide" pension or retirement plan. To disprove "subterfuge" in a benefits discrimination case, an employer had to demonstrate a correlation between age and benefit cost consistent with the 1969 interpretation. Since the "equal cost" principle was inapplicable in an involuntary retirement case, an employer could disprove "subterfuge" by more generalized proof of its subjective intent. See e.g. 109 S.Ct. at 2863. It was not surprising, therefore, that while the "equal cost" principle applied to benefits discrimination, it was not the "exclusive means of escaping classification as a subterfuge."

By eliminating the entire spectrum of mandatory retirement cases in 1978, Congress narrowed the scope of the § 4(f)(2) exception to cases involving benefits discrimination. As has been the rule since 1969, the only method of disproving benefits discrimination has been the objective standard embodied in the "equal benefit or equal cost" principle.

V. THE PROPOSED LEGISLATION: S.1511

In response to the decision in Betts, legislation to amend the ADEA has been introduced in both the Senate and the House of Representatives. On July 12, 1989, Senator John Heinz (R-Pa) introduced S.1293, the "Age Discrimination in Employment Act Amendments of 1989." On August 3, 1989, Senator David Pryor (D-Ark.) along with co-sponsors Jeffords, Metzenbaum, Kennedy, De Concini and Bumpers introduced S.1511, the "Older Workers Benefit Protection Act." In the House of Representatives, H.R. 3200 was introduced on August 4, 1989, by Congressman Edward R. Roybal (D-Ca.), Chairman of the House Select Committee on Aging, along with co-sponsors Augustus Hawkins, William Clay, Mathew Martinez and James Bilbray. H.R. 3200 is identical to S.1511.[11]

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[11] Apart from their effective date provisions, S.1293 and S.1511 are substantially similar in substance. For that reason, I will simply address the specific provisions of S.1511.

S.1511 would amend the ADEA in several important respects to either modify, or overturn altogether, the holding and legal analysis contained in Betts. First, § 3 of S.1511 would define the term "compensation, terms, conditions, or privileges of employment" under § 11 of the ADEA. This amendment would make it clear that § 4(a)(1) of the ADEA prohibits discrimination in all aspects of the employment relationship, including the provision of virtually all forms of employee benefits. This provision would overturn the Betts holding that § 4(a)(1) does not, like its counterpart under Title VII, broadly prohibit discrimination in employee benefits. Since the prohibitions of § 4(a)(1) of the ADEA and § 703(a)(1) of Title VII are in haec verba, this definitional section would ensure that they are similarly construed by courts. Prior to Betts, the courts of appeals had uniformly applied § 4(a)(1) to age-based distinctions in employee benefit plans. See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988); Cipriano v. Board of Education of North Tonawanda School District, 785 F.2d 51 (2d Cir. 1986); Crosland v. Charlotte Eye, Ear & Throat Hospital, 686 F.2d 208 (4th Cir. 1982).

Second, § 4 of S.1511 would amend § 4 of the ADEA, 29 U.S.C. § 623, to rewrite the exception for bona fide employee benefit plans. The proposed provision, 29 U.S.C. § 623(f)(2)(B), would replace the subterfuge language of § 4(f)(2) with the "equal cost" requirements set forth in the administrative regulations for almost twenty years. The new provision would specifically incorporate the limitations applicable to benefits and the "benefit package" approach set forth in 29 C.F.R. §1625.10 "as in effect on June 22, 1989." That same section of S.1511, § 4, would also shift the burden of proof to the employer to demonstrate that the challenged action met the requirements of the new affirmative defense. Here again, the legislation would restore the universal understanding of the courts of appeals prior to Betts, viz. that § 4(f)(2) was an affirmative defense to which the employer bore the burden of proof. See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d at 1263; Karlen v. City Colleges of Chicago, 837 F.2d at 318; Cipriano v. Board of Education of North Tonawanda, 785 F.2d at 57-59.

Fourth, S.1511 amends § 4 of the ADEA to add a new subparagraph "k" which states that both seniority systems and employee benefit plans "shall comply with this act regardless of the date of adoption of such system or plan." Consistent with the 1978 legislative history accompanying the elimination of mandatory retirement, the purpose of this provision is to make absolutely clear that the requirements of the ADEA apply to all employee benefit plans and seniority systems, including those which were instituted prior to the 1967 enactment of the Act. Although Congress unequivocally announced its intention to accomplish this objective in 1978, the Court in Betts disregarded that legislative history and affirmed its 1977 ruling in United Air Lines v. McMann, 434 U.S. 192 (1977), in which the Supreme

Court held that plan provisions which predated the ADEA could not, as a matter of law, constitute a "subterfuge" to evade the purposes of the act.

Finally, S.1511 has an effective date provision (§ 5) which would make its amendments applicable to "all actions or proceedings brought under the [ADEA] after June 23, 1989 and actions or proceedings brought under such act prior to June 23, 1989 which were pending on June 23, 1989." In light of the administrative regulations in effect for almost twenty years, particularly the lengthy interpretations applying the "equal cost" principle to a variety of employee benefits which were issued in 1979, the application of the amended law to cases pending on June 23, 1989 would work no injustice to the business community. Indeed, assuming that an employer was operating in a manner consistent with the long-standing interpretations, the effective date provision in S.1511 should work no hardship at all. Employers in compliance with these long-standing regulations need not change any benefit practices in order to comply with the amended version of the ADEA. On the other hand, employers who have until now disregarded the operative regulations have subjected themselves to the prospect of double damages under the ADEA. See 29 U.S.C. § 626(b).

In addition to the long-standing regulations, the courts of appeals were unanimous in their holdings that employers who provided disparate benefits based on age must satisfy the "equal cost" standards set forth in the existing regulations.

See e.g., EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988); Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied 108 S.Ct. 2038 (1988); Betts v. Hamilton County Board, 848 F.2d 692 (6th Cir. 1988), reversed, 109 S.Ct. 2854 (1989).

VI. OBJECTIONS TO S.1511

Following the introduction of S.1511 (and its identical counterpart in the House, H.R. 3200), opponents of the legislation have circulated position statements articulating a variety of arguments why legislation should not be enacted to overturn the decision in Betts. While this testimony will not attempt to respond in detail to each argument raised, I will attempt to address the principal issues which may be of interest to members of Congress in analyzing the merits of S.1511 and its anticipated effects on both employers and employees covered by the ADEA.

1. The Legislation Would Enact The Status Quo By Incorporating The "Equal Cost" Standard

Critics of S.1511 claim that if Congress enacts the "equal benefit or equal cost" principle into the ADEA, the resulting amendment will substantially narrow the defenses available to employers in benefit discrimination cases. This criticism is unfounded.

From the time the ADEA was passed until 1978, the

§ 4(f)(2) defense was available in two generic types of employment discrimination claims. First, the defense was available to an employer who, pursuant to the terms of a bona fide pension or retirement plan, mandatorily retired employees based on age. See United Air Lines v. McMann, 434 U.S. 192 (1977).[12] Second, as discussed infra at 14-16, § 4(f)(2) has always permitted an employer to justify a benefit reduction by demonstrating that the challenged reduction correlates with an increased cost in a particular benefit. While the courts applied a generalized "business purpose" standard in those cases in which employees were challenging mandatory retirement, both the administrative agencies and the courts have applied the "equal benefit or equal cost" principal in determining whether a reduction in employee benefits constitutes a "subterfuge" to evade the purposes of the ADEA. Once the entire category of mandatory retirement cases was eliminated by virtue of the 1978 amendments to the Act, the legal standards which remained, applicable only to benefits discrimination cases, continued to be the "equal benefit or equal cost" standards. Contrary to objections raised by opponents of S.1511, the "equal benefit or equal cost" standard has been the only standard throughout the ADEA's history by which an employer can justify benefits discrimination based on age.

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[12] Indeed, as the Court recognized in McMann, prior to the 1978 amendments the Department of Labor took the position that mandatory retirement pursuant the terms of the pension plan was lawful. McMann, 434 U.S. at 197 n.4; see 29 C.F.R. § 860.110(a)(1978).

B. Age-Based Denials of Severance Benefits Will Continue to Violate the ADEA.

Critics of S.1511 suggest that the enactment of the "equal benefit or equal cost" principle will "outlaw the traditional practice of coordinating retirement plans with other income maintenance contingency benefit programs such as severance pay...." In particular, in commentary circulating regarding S.1511, the Association of Private Pension and Welfare Plans (APPWP) has suggested that "coordination" of severance with pension benefits is a beneficial business practice which allows employers with limited dollars to adequately provide for all employees at the time of layoff. This commentary, and others like it, intentionally overlook two fundamental axioms regarding severance benefits under the ADEA -- that severance "integration" results in substantially greater benefits to younger workers based solely on age and, that the courts of appeals have uniformly held that severance "integration" violates the ADEA.

First, under the rubric of "integration", "coordination", and "duplication", opponents of the bill have glossed over the obvious effects of any practice which offsets severance benefits against pension entitlement. Indeed, a simple example of comparably situated employees at the time of layoff demonstrates the undisputed adverse affects which "integration" has on older workers. Assume, for example, that XYZ Manufacturing Co. is laying off all of its employees at a particular plant location. The company's pension plan has a normal retirement age of 65, at which time a retirement benefit is payable in the amount of 1% X (the employee's monthly salary) X (years of service). Assume as well that XYZ Manufacturing Co. also has a severance pay plan which provides lump sum benefits to laid off employees. At layoff, employees are paid a lump sum which equals their (average weekly pay) X (years of service).

With these standard pension and severance pay plans as an example, the task is then to analyze the manner in which "integration" of these two plans affects comparably situated employees based on their age. Assume, therefore, that employees A and B both have 20 years of service with XYZ, and both have average weekly salaries of $500 ($2,000 per month). The only difference between employee A and Employee B is their age. Employee A is 45 years old, Employee B is 65 years old.

The substantial disparity in their benefits as a result of their layoffs is obvious. Employee A is entitled to a $10,000 lump sum payment immediately upon layoff. The $10,000 represents Employee A's 20 years of service times his average weekly salary of $500. Employee A will also be entitled, at age 65, to $400 per month pension for life. Employee A's pension is computed by multiplying 1% times $2,000 (his average monthly salary) times 20 (his years of service). Thus, as a result of his layoff, Employee A gets a $10,000 lump sum benefit plus a $400 per month pension at age 65.

In stark contrast, Employee B, age 65, receives no benefit whatsoever under the terms of the severance pay plan. This is so because as is the custom with "integration," severance pay is not available to pension-eligible employees at layoff. As a consequence, Employee B is entitled only to a $400 per month pension commencing at age 65. Employee B's pension was computed in identical fashion as that of Employee A, 1% times $2,000 (his average monthly salary) multiplied by 20 (Employee B's years of service). As is readily apparent, both employees get identical pensions at age 65, $400 per month. Employee A, however, because of his age, receives an additional $10,000 lump sum severance payment. Despite the terminology employed by opponents of S.1511 to describe this practice, since the only difference between the two employees is age, the practice of "integration" constitutes impermissible age discrimination. Exhibit A attached hereto demonstrates this point.

Indeed, by resurrecting the concept of "integration" in the context of S.1511, opponents of the bill are attempting to win a battle through this legislative process that they have been unable to win either before the enforcement agency or the courts. Since 1979, the Interpretive Bulletin issued by the Department of Labor (and continued in effect by the EEOC) has prohibited employers from "aggregating" employee benefits with amounts payable under a retirement or pension plan for the purposes of determining compliance with § 4(f)(2). This process of "aggregating" employee benefits, another descriptive term for "integration", was specifically rejected in the regulations as it applied to pension benefits.[13] See 29 CFR § 1625.10 (f)(2)(ii)(1987) ("A benefit package approach shall not apply to a retirement or pension plan.")

Perhaps more to the point, both courts of appeals to address the issue have concluded that the practice of "integration", which results in the deprivation of severance benefits to pension-eligible employees, violates the ADEA. See EEOC v. Westinghouse Electric Corporation, 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Westinghouse Electric Corporation, 869 F.2d 696 (3rd Cir. 1989); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984). As both the Third and Ninth Circuits have recognized, severance pay plans based on length of service involve no age-related cost factors which would justify a reduction or denial of severance based on age. Westinghouse II, 869 F.2d at 710; Westinghouse I, 725 F.2d at 224; EEOC v. Bordens, 724 F.2d at 1396.

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[13] Nor is it germane that ERISA permits employers to "integrate" pension benefits with Social Security. In a pension plan that authorized integration both Employees A and B of XYZ Manufacturing (again assuming comparable service and salary) would "lose" the same amount of pension to "integration" at age 65. Since both would be identically affected, the practice sanctioned by ERISA involves no age discrimination.

C. Many Early Retirement Incentives Were Lawful Before Betts And Would Be Lawful Under S.1511.

Critics of S.1511 suggest that the proposed legislation will unduly restrict an employer's ability to offer voluntary early retirement incentive benefits. This argument is a red herring, however. Even before Betts, numerous early retirement incentive benefits were structured in such a way as to comply with the ADEA. These programs, and many others, will continue to be available to employers who want to use early retirement incentive benefits as a means of voluntarily reducing work force size. A limited sample of non-discriminatory early retirement incentives is set forth in Exhibit B.

Traditionally, employers have offered early retirement incentive benefits in one of several ways. Special lump sum or periodic benefits could be provided as incentives to induce retirement. Alternatively, existing benefits in current pension or retirement plans could be improved for employees willing to depart during a specified period of time, commonly referred to as the "window." Or third, incentive benefits could take the form of some combination of these two categories.

With regard to early retirement incentive benefits which are unrelated to existing benefits programs, there are numerous benefits which can be offered in a nondiscriminatory fashion. A flat dollar amount (lump sum benefit) might be the most traditional benefit in this category. Prior to Betts, a lump sum benefit offered to all employees age 55 and older did not violate the ADEA, Henn v. National Geographic Society, 819 F.2d 824, 826 (7th Cir. 1987) (severance payment of one year's salary, medical coverage for life, and other benefits), while lump sum benefits specifically denied to employees based on age have been found unlawful. Cipriano v. Board of Education of North Tonowanda, 700 F.2d 1199, 1211 (W.D.N.Y. 1988) (denying $10,000 lump sum benefit to employees over 60 on the grounds they "would be retiring anyway" constitutes arbitrary age discrimination). Like the across-the-board incentive offered to all employees over age 55 in Henn, any similar incentive calculated based on salary or years of service which is offered to employees without regard to age would not violate § 4 of the ADEA. As a consequence, the defense for employee benefit plans does not come into play, either before Betts or under the language proposed in S.1511.

In addition, an employer could offer an early retirement incentive benefit which was calculated based on accumulated sick pay. So long as such a benefit was offered without regard to age to employees eligible for retirement, for example, there would be no violation of § 4(a) of the ADEA. In contrast, however, age-based distinctions in incentives such as these violated the ADEA even before Betts, since they use "age -- not cost or years of service, or salary -- as the basis for varying retirement benefits,...." Karlen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir.), cert. denied, 108 U.S. 2038 (1988). Likewise, offering free health insurance during retirement would also be a lawful incentive, so long as there were no restrictions based on age. Id.

Moreover, retirement incentive benefits can be provided pursuant to an existing pension or retirement plan in a variety of ways which do not even implicate the prohibitions on age-based distinctions set forth in § 4(a) of the ADEA. For example, as an inducement to retire, an employer could impute an additional five years of service (without regard to age) to employees already eligible for retirement under the pension plan. Such an incentive would provide a non-uniform, but non-discriminatory, increase in the pension benefits of all potential participants based on their current salary and service. Similarly, an employer could provide an across-the-board percentage increase (without regard to age) to all employees already eligible for retirement. Such an incentive would result in non-uniform, but nondiscriminatory, increases for those eligible based on existing pension entitlement. Moreover, a flat dollar approach would also be permissible pursuant to a pension plan, just as it would as an independent benefit.

In addition to the non-pension and pension-type incentives, employers are also free, both before Betts and under S. 1511, to use some combination of the two to encourage employees to depart. And, of course, employers need not limit their efforts to their older employees. When faced with the need to cut back, some companies have offered generic "exit incentives" to broad categories of eligible employees regardless of age. Most often provided as a flat dollar amount (lump sum payment), exit incentives frequently accomplish the same business objectives that companies intend to accomplish through use of the more narrowly focused early retirement incentive benefits. The advantage to generic exit incentives is, of course, that since they are not based on age, an employer need not be concerned about benefits discrimination claims under the ADEA.

Legalities aside, generic exit incentive programs avoid the use of dangerous age-based assumptions concerning an employee's expected longevity. In at least one early retirement incentive case, the employer's only explanation for denying the incentive to employees over age 60 was that they "would be retiring anyway." Cipriano v. Board of Education of North Tonowanda, 700 F. Supp. at 1211. Not only is such an age-based assumption impermissible under pre-Betts law, see Leftwich v. Harris-Stowe State College, 702 F.2d 686, 691-92 (8th Cir. 1983); Marshall v. Arlene Knitwear, 454 F. Supp. 715, 728 (E.D. NY 1978), affirmed in part and reversed in part, 608 F.2d 1369 (unpublished opinion), they are unsupported factually. Recent amendments to the Employee Retirement Income Security Act of 1974 ("ERISA") which shortened the mandatory period of vesting to five years were taken in large measure based on congressional recognition of the fact that the U.S. labor force is extremely mobile. Employees change jobs with tremendous frequency and for many reasons, only one of which is to retire. There is simply no practical foundation upon which to assume that older employees are the only group of individuals who can be induced to change jobs when offered large sums of cash or substantially improved retirement benefits. Indeed, anecdotal evidence suggests that older employees are more likely, not less, to remain with their current employer for a longer period of time.

Finally, while the EEOC appears to enthusiastically support the manner in which S.1511 incorporates the "equal cost" principle from the EEOC's regulations, it apparently has some hesitation in applying that same principle to early retirement incentive benefits. This hesitation appeared in the brief which the EEOC filed before the District Court in the retirement incentive case of Cipriano v. Board of Education of North Tonawanda. In that case, the EEOC joined the plaintiffs and the American Association of Retired Persons in arguing that the two plaintiffs, both of whom were excluded from a $10,000 lump sum retirement incentive based on their age (over 60), were entitled to summary judgement and liquidated damages under the ADEA.

Recognizing that the "equal benefit or equal cost" regulations governed the legal standards in the case, see infra at 17 & n.10, both the EEOC's General Counsel and Deputy General Counsel recommended to the Commission that the agency's brief declare the challenged plan to be unlawful.[14] The Commision rejected this advice, however, and in it's brief the EEOC intimated that early retirement incentive programs should not be held to the same "equal cost" standard that applies to all other forms of benefit discrimination under the ADEA. This suggestion appears premised on the "voluntary" nature of early retirement incentive plans.[14/] The EEOC's "voluntary" distinction is of no legal significance for at least two reasons.

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[14] See Twenty Years of the Age Discrimination in Employment Act: Success or Failure?, Hearing Before the Senate Special Committee on Aging, September 10, 1987, at 579 and 629.

First, the "voluntary" distinction has already been rejected by the Supreme Court. In Arizona Governing Committee For Tax-Deferred Annuity And Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983), the Court specifically held that "the opportunity to participate in [an employee benefit] plan constitutes a condition or privilege of employment." 463 U.S. at 1079. In addressing the defendant's claim that its plan did not violate Title VII because participation in the plan was voluntary, the Court in Norris concluded that "[it] is irrelevant that female employees in Manhart were required to participate in the pension plan, whereas participation in the Arizona Deferred Compensation Plan is voluntary." 463 U.S. at 1081-1082 n.10.

Second, the Second Circuit already rejected the EEOC's suggestion that a prior opportunity to participate in the challenged retirement incentive would have rendered the plan lawful. Contrary to the EEOC's argument, the Second Circuit had

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[14/] Ironically, the EEOC has never formally litigated a claim of benefits discrimination in an early retirement incentive program, nor has it ever participated as amicus curiae in a retirement incentive case alleging benefits discrimination (other than Cipriano). The absence of EEOC litigation activity in this area presumably has contributed substantially to the dearth of early retirement incentive cases, and has substantially impaired the development of the private bar on claims of this kind.

already held this consideration to be irrelevant to a determination of whether plaintiffs were unlawfully denied an incentive at the time of their retirement. As the court ruled, "the 'alleged window provision' is not in the record, however, and we would not find it material to our decision if it were, since appellant's claim is not that they were denied the opportunity ever to participate in the incentive, but that they were denied the opportunity to do so on the date they ultimately chose to retire." Cipriano v. Board of Education of North Tonowanda, 785 F.2d at 52 n.2.

Similarly, the Seventh Circuit has also flatly rejected the EEOC's novel twist to retirement incentives. In Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.) (Posner, J.), three professors age 65 and older challenged a negotiated retirement incentive that reduced benefits substantially for employees who worked beyond age 65. The fact that the plaintiffs could have retired earlier and received larger benefits was of absolutely no consequence. The College's explanation for the substantial decline in benefits at age 65 was its desire to "induce workers to retire by age 65." As Judge Posner held:

> This strikes us as a damaging admission rather than a powerful defense. To withhold benefits from older persons in order to induce them to retire seems precisely the form of discrimination at which the Age Discrimination in Employment Act is aimed. Rather than offering a carrot to all workers 55 years and older, as in the Henn case, the City Colleges are offerring the whole carrot to workers 55-64 and taking back half for workers 65-69.

Karlen, 837 F.2d at 320. Applying the "equal cost" principle the Court stated that:

> ...where, as in the present case, the employer uses age---not cost, or years of service, or salary---as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of section 4(f)(2). See 29 C.F.R. § 1625.10(a)(1)(d)(1)--(3) (EEOC regulation interpreting section 4(f)(2)).

Id. at 319.

There is a broad range of non-discriminatory retirement incentives successfully used by the business community which would be wholly unaffected by S.1511. What opponents of S.1511 want, however, is to achieve through legislation what they have lost in the courts ---the legalization of age-discriminatory programs. Since the discriminatory programs are based on unlawful assumptions that older workers "would be retiring anyway," see Cipriano v. Board of Education, 700 F. Supp. at 1211, acceptance of that unsupported stereotype could open the floodgates to other discriminatory practices. Indeed, under the same rationale, an employer attempting to increase employee productivity could deny generous bonus payments to older workers because they "would be retiring anyway."

For all these reasons, any early retirement amendment to S.1511 would be inconsistent with the long standing regulations, overturn settled law on early retirement incentives, and heighten the prospects for discriminatory benefits to older workers.

VII. CONCLUSION

The changes proposed by S.1511 are consistent with the ADEA's 1967 and 1978 legislative history, over twenty years of administrative regulations and the vast wealth of judicial authority. They harmonize two critical purposes of the ADEA by outlawing arbitrary age discrimination in employee benefits and at the same time ensuring that employers need not incur undue expense in the hiring and retention of older employees. Restoration of this sensible balance is particularly appropriate now, as vast demographic changes in the U.S. labor force require a re-evaluation of the manner in which the country effectively utilizes older employees. Only by guaranteeing non-discriminatory benefits under the ADEA can we ensure the continued participation of older workers in the labor force.

EXHIBIT A

SEVERANCE "INTEGRATION"

XYZ MANUFACTURING

PENSION PLAN

NORMAL RETIREMENT AGE IS 65

BENEFIT AT 65= 1% x (Ave. Monthly Pay) x (Service)

SEVERANCE PAY PLAN

BENEFIT AT LAYOFF = (Weekly Pay) x (Service)

NO SEVERANCE IF PENSION-ELIGIBLE

EMPLOYEE A	EMPLOYEE B
Age 45	Age 65
20 Years Service	20 Years Service
$500/wk. Pay	$500/wk. Pay

BENEFITS AFTER LAYOFF

$400/mo. Pension at 65	$400/mo. Pension at 65
$10,000 Severance	No Severance

EXHIBIT B

LAWFUL EARLY RETIREMENT INCENTIVE BENEFITS

	PRE-BETTS	S.1511
NON-PENSION BENEFITS		
1. Flat Dollar (i.e. $20,000)	X	X
2. Service Based ($1,000 x Years Service)	X	X
3. % Of Salary (50% of Annual Salary)	X	X
4. Retiree Health (For Life)	X	X
PENSION BENEFITS		
5. Imputed Service	X	X
6. % Increase (20% increase)	X	X
7. Flat Dollar Increase ($200 per month)	X	X

Senator **Metzenbaum**. Our next witness is James D. Short, ERISA Industry Committee, Washington, DC.

Happy to have you with us, sir.

Mr. **Short**. Good afternoon, Mr. Chairman.

My name is Jim Short, and I appear on behalf of the ERISA Industry Committee.

We believe that the discussion of integration focuses on a prime issue. EEOC says that packaging is acceptable, but not including pensions. This is really useless to equitable delivery of benefits because pension interacts with many benefits.

Senator Heinz just demonstrated the interaction of severance and pension and properly pointed out the extra benefits often provided early retirements through a pension program.

As currently drafted, we believe that S. 1511 and S. 1293 codify guidelines that are illogical, impractical and harmful to most employees and, as we have heard today, may not even fully reflect the current views of the EEOC.

We respectfully suggest that if Congress concludes that legislation in this area is necessary, the legislation should take into account two basic facts: First, an employer does not have unlimited resources to spend on employee benefits; second, because the modern work force is highly diverse and includes employees with a wide variety of ages, family responsibilities and income levels, the needs of all employees in the work force are not identical.

The employer's objective is to allocate its limited resources to meet the needs of all of its employees on an equitable basis. Many employers maintain a pension plan to provide their employees with retirement income and a severance plan to provide financial assistance to employees who lose their jobs.

Employers either limit eligibility for severance pay to employees who are not eligible for an immediate pension or reduce the amount of the severance benefit by the value of the pension benefit.

The employer's objective is to assure that severance pay is directed to those who are not provided other income; that is, those who cannot receive an immediate pension.

For example, it seems eminently fair, logical and equitable to pay severance benefits to an employee who loses his job at age 45 with 20 years of service and to pay less or perhaps even no severance to another 20-year employee who loses his job at age 65 with a right to receive an unreduced pension beginning immediately.

The 65-year-old receives a pension immediately while the 45-year-old waits 20 years. The severance pay is designed to provide some temporary income for the worker who is not entitled to receive an immediate pension.

EEOC guidelines require an employer to ignore the value of the pension benefit in determining the amount of the employee severance benefit.

If Congress codifies the EEOC's guidelines which require benefit-by-benefit cost justification, employers will be prevented from presenting a rational and coordinated package of benefits to their employees.

For example, major employers typically maintain both long-term disability plans and pension plans. If the two Senate bills are added to the requirement imposed by ERISA and the Internal Revenue Code, many employers will be required simultaneously to provide long-term disability benefits, retirement benefits and pension accruals to disabled employees over age 70.

Congress should not enact legislation that requires such duplicate benefits, as disability benefits cannot survive such a requirement.

The overriding objective in all compensation programs is precision in the delivery of benefits. That is, don't waste resources by paying too much to some people through overlapping or duplicate benefits and don't let some people fall through the cracks in the benefit network. This desire on the part of the employer and in the case of represented employees, the union, is seen in the prevalent practice of benefit coordination of pensions, disability insurance, severance, State unemployment, and supplemental unemployment and even integration of statutory programs of Social Security and Workers' Compensation with private pensions.

It is unrealistic to assume that employers will continue employee benefit programs that waste limited resources by providing duplicate benefits to some employees. If one of these bills is passed, employers will redesign their plans to comply with the law but, to avoid unacceptable cost increases, will be forced to reduce or eliminate some of the benefits they now provide.

If legislation is deemed appropriate, we urge that such legislation be prospective in its application, that it permit all of the employer's benefit plans to be evaluated on a benefit package basis, and that it permit an employer to use business reasons other than cost to justify age-based distinctions in its employee benefit plans.

We ask, Senator Metzenbaum, that the letter to you of September 1, 1989, from Mr. Charles Corry, chairman of USX Corporation, be made part of the record of this hearing.

Senator **Metzenbaum**. Without objection it will be.

Mr. **Short**. Thank you for this opportunity to talk with you.

[The prepared statement of Mr. Short and letter of Mr. Corry (with attachments) follows:]

PREPARED STATEMENT OF THE ERISA INDUSTRY COMMITTEE
JAMES D. SHORT, VICE PRESIDENT

Chairman Metzenbaum, Chairman Pryor, and members of the Committee and Subcommittee, my name is James D. Short. I appear today on behalf of The ERISA Industry Committee, commonly known as ERIC. I currently serve as ERIC's Vice President and Treasurer. I am also Vice President - Benefits Administration of USX Corporation. Accompanying me is John M. Vine of Covington & Burling, ERIC's legal counsel.

ERIC is an association of more than 125 of the Nation's largest employers. ERIC's members provide a wide variety of employee benefits under a multitude of interconnected, broad-based employee benefit plans. These plans provide such benefits as health and life insurance, layoff benefits, disability income, sick pay, severance pay, and retirement income. Employer-sponsored plans have been remarkably successful in efficiently allocating, through an integrated and coordinated structure, limited employer resources to meet the important and diverse needs of a large and heterogeneous work-force. More than 25 million Americans are covered by ERIC's members' plans. Many of these plans are maintained pursuant to collective-bargaining agreements. ERIC's views are representative of a wide cross-section of major plan sponsors in the private sector.

At the outset, let me explain why I am not here. I am not here to reargue the Betts case or to evaluate Ohio's treatment of disabled employees. To the contrary, I am here to testify on the subject of this hearing: whether Congress should enact S.1511 or S.1293.

These bills (1) codify an EEOC interpretive bulletin or guideline that was invalidated by the Supreme Court and that provided that age-based distinctions in employee benefit plans are permissible under the ADEA only if the distinctions are justified by cost differences, (2) put the burden on the employer to prove that an employee benefit plan that makes age-based distinctions does not violate the ADEA, (3) provide that the ADEA applies to employee benefit plans that were adopted prior to the enactment of the ADEA in 1967, and (4) require that each benefit be treated separately. The bills also would apply retroactively in certain respects.

Although we oppose enactment of these bills, we are very willing to work with the Committee and the Subcommittee to ensure that discrimination against older employees is prohibited and that employers are able to provide coordinated, integrated benefit packages that meet the needs of all their employees.

However, we believe that the bills, as currently drafted, codify guidelines that are illogical, impractical, and harmful to most employees. It is our understanding that these guidelines do not even fully reflect the current views of the EEOC, the federal agency that is responsible for interpreting and enforcing the ADEA. In 1988, before the decision in Betts, the EEOC announced that it was considering making revisions to the guidelines. 53 Fed. Reg. 26,788-790 (July 15, 1988). Certainly, revisions in the guidelines and the positions taken therein are essential. Even before Betts, the guidelines were obsolete in important respects, since the statute has been amended a number of times after the issuance of the guidelines.

We respectfully suggest that if Congress concludes that legislation in this area is necessary, the legislation should take into account two basic facts. First, an employer does not have unlimited resources to spend on employee benefits or employee compensation. Competitive conditions and the employer's own financial circumstances limit the amount that the employer can spend. Second, because the modern work-force is highly diverse, and includes employees with a wide variety of ages, family responsibilities, and income levels, the needs of all of the employees in the work-force are not identical. Typically, the employer's objective is to allocate its limited resources to meet the needs of its employees efficiently and equitably. In many cases, these decisions are made jointly by management and labor in collective bargaining. We urge the Congress not to enact legislation that prevents an employer from providing the benefits that best suit the needs of its employees.

In designing their benefit plans, employers attempt to deliver benefits to their employees in a coordinated system that efficiently and equitably allocates the available resources. For example, many employers maintain a pension plan to provide their long-service employees with retirement income and a severance plan to provide immediate financial assistance to short-service employees who are permanently laid off. In many instances employers limit eligibility for severance pay to employees who are not eligible for an immediate pension, reduce the amount of the severance benefit by the value of the pension benefit, or reduce the amount of the pension by the amount of severance paid. Severance programs are not designed to be additive to pensions but are structured to provide benefits to those employees who are not eligible for pensions or who will not receive pension payments until many years in the future.

Defined benefit pension plans, by design, favor long-service employees by making them entitled to receive immediate early retirement pensions if they suffer job loss through lack of work or disability. Severance pay provides funds to those with insufficient service or age to receive immediate pensions. For example, it seems eminently fair, logical, and equitable to pay severance benefits to an employee who is laid of at age 45 with 20 years of service, but who is not eligible for an immediate pension, and to pay less or perhaps even no severance benefits to another 20-year employee who is laid off at age 65, with a right to receive an unreduced pension beginning immediately. The severance pay is designed to give a limited pool of funds to the first employee to hold him over while he searches for new employment. By contrast, the employee who is eligible for an immediate pension has available a stream of income over his remaining life.

Nevertheless, the invalidated EEOC guidelines require an employer to ignore the value of the pension benefit in determining the amount of an employee's severance benefit. Such a rule needlessly spreads the limited resources available for severance pay to a greater group, regardless of need, and thus reduces the amount available to those who have no other sources of funds. For example, if Congress codifies the EEOC guidelines, many employers would in all probability reduce the severance benefit for their 40 to 50-year-old employees with substantial family responsibilities who are not entitled to immediate pensions. The reductions would be necessary to compensate for the fact that severance also would have to be paid to employees who are eligible to receive immediate pensions, i.e., to receive duplicate benefits.

To employers, this result makes no sense. It should be permissible to take the value of an employee's pension benefit into account in determining the amount of his severance benefit. In other words, to coordinate the benefits. Many employers have a 30 year or longer history of structuring their benefit programs as an integrated whole. If an employer is not permitted to coordinate its benefit plans, and is required to provide both severance pay and immediate pension benefits to the same employees, many employers will drastically curtail or terminate their severance programs.

The nature of a dynamic and competitive business environment forces plants to close. We urge that pension plans be permitted to continue to pay immediate unreduced early retirement pensions and Social Security supplements to the affected pension-eligible employees, while the employer pays layoff benefits and severance payments to those not eligible for immediate pensions. S.1511 and S.1293 threaten these programs.

Moreover, many benefit plans are collectively bargained. Congress should not enact legislation that prevents a union from agreeing, on behalf of the employees whom it represents, to allocate pension benefits to older employees and severance benefits to younger employees. Such trade-offs are at the heart of the collective-bargaining process.

To take another example, many employers offer early retirement "window" benefits from time to time. In providing a "window" benefit, a pension plan typically provides that a member of a specified class of employees is eligible for enhanced retirement benefits if the employee retires during a designated "window" period. Early retirement "window" plans have the salutary purpose of allowing an employee to choose to retire early and to receive an immediate pension that helps to offset the loss of wages that comes with early retirement. Early retirement "window" programs (1) give employees greater freedom than they otherwise would have, (2) preserve jobs and increase promotion opportunities for those who do not take early retirement, and (3) permit employers to reduce labor costs without relying on involuntary termination programs.

The employer also might provide that an employee who does not meet the "window" program's age and service requirements could elect to terminate employment and to receive severance benefits in lieu of the early retirement "window" benefits. Severance benefits are critically important to employees who are not eligible to receive immediate retirement benefits. Although this arrangement is sensible, logical, and equitable, S.1151 and S.1293 would forbid it or require payment of severance to the pension eligibles -- even if the value of the enhanced early retirement benefits exceeds the value of the severance benefits.

Some early retirement "window" plans also provide a smaller benefit enhancement to older employees who have reached, or who are approaching, the plan's normal retirement age. The reason for the small enhancement is that employees who are approaching normal retirement age do not need the same incentive to retire early as do younger employees. In addition, since the employer's objective is to reduce the size of its work-force, the employer will receive a greater benefit when a younger employee, with a potentially longer future career, retires.

Although the cost-justification rules in the EEOC's invalidated guidelines appear to prohibit an age-based "window" plan of this kind, the EEOC has stated that the ADEA permits an early retirement "window" plan to provide unequal benefits to older workers if (1) participation in the plan is voluntary for all retirement-eligible employees, and (2) there is a legitimate business reason for imposing age limitations. See Memorandum of Law for the Equal Employment Opportunity Commission as Amicus Curiae, filed in Cipriano v. Board of Education, No. 84-CV-80C (W.D.N.Y.) at 28-33.

The EEOC has recognized that the cost-justification rules in its guidelines do not deal adequately with all employee benefits and that the cost-justification rule is not the exclusive method of determining whether age-based distinctions under a benefit plan are permissible. Indeed, during oral argument in the Betts case, the Solicitor General specifically conceded this point. See Official Transcript at 43-44.

By codifying the cost-justification rules, S.1151 and S.1293 would make the statute significantly more restrictive than it was before the Supreme Court's decision in Betts. These bills would, in effect, perpetuate an erroneous application of the law and sound policy by elevating what was once (prior to 1979) a regulatory safe harbor into an exclusive statutory rule.

If Congress codifies the EEOC's guidelines, employers will be prevented from providing a rational and coordinated package of benefits to their employees. For example, major employers typically maintain both long-term disability plans and pension plans. The usual plan provides a disabled employee with a benefit greater than the pension equivalent for his earned service until normal retirement age and then reduces that benefit to the pension level earned for his actual years of service. If one of the Senate bills is added to the requirements imposed by ERISA and the Internal Revenue Code, many employers will be required simultaneously to provide long-term disability benefits, retirement benefits, and pension pension accruals to disabled employees over age

70. As a result, many employers will prevent this duplication of benefits by eliminating some of these benefits, thereby hurting the employees that the bills are intended to help.

If legislation is deemed appropriate, we urge that any such legislation be prospective in its application, that it permit all of the employer's benefit plans to be evaluated on an integrated-coordinated benefit package basis, and that it permit an employer to use business reasons other than cost to justify age-based distinctions in its employee benefit plans.

Thank you for giving us an opportunity to present our views. We will be happy to respond to any questions that the Chairmen or other members of the Committee and the Subcommittee might have.

USX

USX Corporation
600 Grant Street
Pittsburgh, PA 15219-4776
412 433 1101

Charles A. Corry
Chairman, Board of Directors
& Chief Executive Officer

September 1, 1989

Hon. Howard M. Metzenbaum
U. S. Senate
140 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Metzenbaum:

We are seriously concerned about what appears to be a continuous attack on defined benefit pension plans by the Congress. USX Corporation (formerly United States Steel Corporation) has provided defined benefit pensions to its employees for over 40 years. Currently, this Corporation has funded its pensions responsibly and despite massive downsizing of its steel operations and additions to its pension rolls, USX pension plans continue to be strongly funded. USX is paying monthly pensions to about 120,000 former employees and surviving spouses at an annual outlay of $1 billion and it also provides retiree medical benefits and life insurance to these retirees at a cost of $150 million per year. We in the business community see the Congress in an ever-expanding search for tax revenues, including a threat of additional taxation of various employee benefit programs. At the same time, the Congress and the regulatory agencies continue to restrict the flexibility of the business community to design and operate private pension plans. The message appears to be government disenchantment with the concept of defined benefit pension plans.

Young people today express fear that neither Social Security nor a pension plan will be available when they need retirement income. Yet, the continuous stream of legislation and regulation makes it more and more difficult for employers and employees to plan retirement incomes, age of retirement, employee replacements, pension plan funding, pension cost, tax impact on retiree incomes and employer tax deductions. Government actions are forcing employers and employees to abandon or at least restrict benefit growth in defined benefit plans. We are asking all legislators to carefully reflect on the values of the present system. From the employer viewpoint, it is absolutely clear that recent and currently proposed legislation makes it downright foolhardy to start a new defined benefit plan. The adverse political and regulatory climate for defined benefit plans is pushing employers toward defined contribution plans where workers bear the risk of investment performance, where overall investment efficiency is less, where employees are more apt to dissipate their savings and hence retirement income, and where it is

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much more difficult for employees in the latter part of their working life to set aside funds fast enough to finance inflation.

We are also concerned about attempts to make fundamental changes in the way employee benefit plans are used as an element in a comprehensive employee compensation package for union and non-union employees. Over the long history of American labor relations, employees, often together with union bargainers, have blended various benefits such as pensions and severance, state unemployment and supplemental unemployment benefits, long-term disability benefits and pensions, life insurance and pensions, etc. Through this coordination, employees are benefited by focusing available monies and avoiding overpayment to a lucky few and inadequate payment to others. By this coordinated program design, no one receives double benefits and limited funds are spread to as many people as possible.

Recently the United States Supreme Court decided in Public Employees Retirement System of Ohio v. Betts that employee benefit plans have special standing relative to age discrimination claims. In our opinion, this decision to a substantial degree expresses the law as it was designed in ERISA. There is currently a flurry of legislative activity to overturn that decision. We urge that the Congress study this issue thoroughly and hold public hearings to evaluate all points of view on this subject. USX Corporation has first-hand experience of the tendency of EEOC to extend the old law to its outer limits. In EEOC v. USX Corporation the EEOC claimed and the court held, based on the Third Circuit Court of Appeals decision in the EEOC v. Westinghouse, that USX violated the age discrimination statutes by withholding severance payments to employees retiring on immediate pensions (which included $400 per month supplements) and in denying employees a second fifty-two weeks of Supplemental Unemployment Benefits if they were eligible for early retirement benefits with supplements until age 62. The offset of severance in the pension plan and the interaction of these two types of compensation in USX benefit plans goes back almost 40 years. The basic intent being that an employee upon separation will get a pension or severance pay, but not both. The Supplemental Unemployment interface with pensions was negotiated with the United Steelworkers in 1977 as an Employment and Income Security Program designed to provide income until the employee became eligible for pension. A declaration that these provisions are illegal forces their removal with resultant income loss to employees who have lost their jobs. Attached as Exhibit A is a more extensive description of this problem as it affects USX and steel industry type benefits plans. Let me emphasize that this description of USX's experience on this issue is not confined to this company or even this industry. If legislation overturns the Supreme Court decision, many companies will be forced to pay duplicate benefits to employees and by economic necessity will have to withdraw benefits from many employees.

I have not attached but recommend for your reading and more thorough understanding of this issue a two-page article by APPWP titled "Betts Legislation: We need Hearings" and a publication by the Labor Policy Association and The ERISA Industry Committee titled "Analysis of the U. S. Supreme Court's Betts Decision and Legislative Calls for Reversal".

There are several current legislative proposals extending the attack on defined benefit pension plans which we have summarized on Exhibit B and supplemented with additional narrative by The ERISA Industry Committee (ERIC).

Thank you for considering our opinions on this vital subject of employee benefits. The employment cost directed to employee benefits is a major outlay for our company and is critical to the financial well being of our employees and retirees. It behooves all of us to make sure that these expenditures are financially efficient and reasonable for all concerned. Please, let's not destroy a valuable employee income security system through ill considered legislation that would eliminate a system that has served employees so well for so long.

Yours very truly,

C. A. Corry

Exhibit A

Employee Benefit Plans
and
Age Discrimination

Several bills are under consideration to reverse the recent decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts and to provide that employee benefit plans may not contain age based distinctions which do not reflect actual benefit cost differentials. These bills are intended to re-establish the reasoning of the Third Circuit Court of Appeals in EEOC v. Westinghouse.

There are a number of common provisions in employee benefit plans that would be deemed illegal under these bills because a specific benefit given an older employee in a specific benefit plan might be less than a benefit given a younger employee within that specific plan. (EEOC and some courts have taken the position that each benefit plan must stand separate in meeting age discrimination testing.) Note that the widely used provisions described below characterize steel industry employee benefit plans and have their origins in collective bargaining with the United Steelworkers of America.

1. The pension plan provides a 30-year sole option retirement. This provision would be illegal because an employee who retires at age 58 receives a greater total benefit than does an employee who retires at age 65.

2. The pension plan provides a $400 per month supplement (until attainment of Social Security eligibility) to an employee who is forced to retire early due to the shutdown of a plant. This provision would be illegal because an employee who retires at age 58 receives a greater total benefit than does an employee who retires at age 65.

NOTE: 86% of the current pensioners of USX Corporation retired prior to normal retirement age - 65.

3. The pension plan provides an immediate pension for a long service employee who is terminated due to a plant shutdown and the severance plan provides severance to short service employees who are so terminated. The severance plan disqualifies from severance any employee who is eligible for immediate pension and the pension plan provides for a severance offset. In EEOC v. Westinghouse, and in EEOC v. USX Corporation, the courts have ruled that plans of this nature violate ADEA because this integrated employment and income security program denies older employees severance even though it gives them a more valuable early retirement pension.

4. The Supplemental Unemployment Benefits Plan negotiated by the United Steelworkers and the Coordinating Committee Steel Companies provides a second fifty-two weeks of SUB to employees with twenty or more years of continuous service who are terminated due to a plant shutdown and who are not eligible for an immediate 70/80 pension. In EEOC v. USX Corporation, the court held that this plan violated ADEA because it denied longer service employees the right to receive a second fifty-two weeks of SUB because of pension eligibility even

though the purpose of the second fifty-two weeks of SUB was to bridge the gap between the date wages terminated and the date that the employee became eligible for immediate pension.

It should be noted that the above examples are not fanciful. The first two examples reflect positions taken by the EEOC in the course of reviewing USX Corporation employee benefit plans. The second two examples reflect rulings by the courts in EEOC v. Westinghouse and EEOC v. USX Corporation.

For USX Corporation to comply with the law under the Westinghouse theory (and under bills currently being considered), USX will have to terminate a number of programs and plans which have been extremely beneficial to its employees. For example, to comply with the FEOC's position with respect to example number three, USX terminated effective January 1, 1989, its severance pay program for non-union employees since elimination of severance for all employees precludes any legal violation, even though it lessens the degree of protection afforded the younger employee who loses his job in a plant shutdown. Had EEOC v. Westinghouse remained the law, or if one of the current bills under discussion should be enacted, USX would have to--in violation of its contract with the USWA--eliminate severance for union represented workers.

The basic problem with the age related cost factor approach is that it has no application to most employee benefit plans. It may have a valid application to life insurance, disability insurance and medical insurance programs where the cost of a given benefit increases with age and where there has been an historic practice of diminishing benefits for older employees to reflect to some degree the increasing cost associated with the aging process. It has no application, however, in the case of employment security type programs such as pensions, severance and supplemental unemployment. Indeed, these programs are designed to provide a greater level of benefits to employees who are thrown out of work at an early age than to employees who are fortunate enough to work until normal retirement. Application of the age related cost factor to the employment security programs sounds a death knell for such programs as they are currently constituted. It would seem that employer efforts to provide assistance to those persons who lose their jobs should result in public approbation, not civil prosecution. Voluntary early retirement, such as 30 year sole option pensions, is extremely popular for many employees and their elimination because of a federal edict will be extremely hard to understand or accept.

Exhibit B

Comments on Current Legislation

- Reversions

  We support the use of excess pension assets for payment of health care benefits on behalf of participants in that plan. We strongly oppose the insertion of new benefit concepts into pension plans through this back door. This is a private pension system and employers enter into defined benefit pension plans voluntarily. The attempt to force pension plans to pay unpromised benefits such as cost-of-living adjustments or projected benefits is an unreasonable interference in a private contract between employees and employer.

- Joint Labor Management Control of Pension Plans

  The amendment included in the House Education Budget Reconciliation Bill proposes joint labor-management control over all single employer pension plans. Approximately two-thirds of the employees/ retirees covered under the USX pension plan are represented employees. USX and the United Steelworkers Union have agreed over many years that the Company will provide the benefits and the Company will decide how to finance them. USX committed to the Union a specific level of benefits and the entire Corporation stands behind that promise. We are strongly opposed to any government requirement that employees or unions participate in the funding determination or investment decisions of our pension plans. If the employer carries the risk of providing the benefits, the employer must be free to manage the assets and administer the benefits. Otherwise, unions and employees should be subject to the same risk of investment as employers.

- Exit and User Fees

  Through the Pension Benefit Guaranty Corporation insurance premiums, employers who fund their pension plans responsibly are required to finance those employers who make promises that they do not financially support. In some cases, this means that companies like USX are forced to fund the failed plans of their competitors, such as LTV and Wheeling Pittsburgh. Now certain legislators are proposing that employers should pay exit and user fees for the privilege of reporting to government that they operate an employee benefit plan. Government requires the reports, large volumes of which are never used, and now wants the employer to pay a fee for submitting a government dictated report. It is equally as absurd that government should fine a company for terminating a benefit plan that was established voluntarily. If the employer has financially provided for all the benefits promised, why should a fine be levied because that employer chooses not to continue the plan?

ERIC . . LEGISLATIVE BULLETIN

THE ERISA INDUSTRY COMMITTEE

1726 M Street, N.W., Suite 1101, Washington, D.C. 20036 (202) 833-2800 FAX 202/833-1026

July 24, 1989

Visclosky

Position Paper

Joint Trusteeship of Single-Employer Pension Plans

The joint trusteeship provision requires the assets of a single-employer pension benefit plan to be held in trust by a joint board of trustees, consisting of two or more trustees. The bill requires the trustees to represent, on an equal basis, the interests of the employer and the interests of participants and beneficiaries. The bill provides that if the plan is collectively bargained, the union or unions that represent the employees will appoint the participant trustees unless the union waives its rights; in all other cases, the participants must elect the participant trustees.

ERIC vigorously opposes the joint trusteeship provision, which was adopted without the benefit of hearings and without any advance notice or public debate. Mandatory joint trusteeship will seriously damage the management of pension funds, the voluntary employee benefit system, and employer-employee relationships:

- The employer bears all of the investment risk under a defined benefit pension plan. If the plan suffers investment losses, the employer must make up for the losses by increasing its contributions to the plan in accordance with ERISA's minimum funding standards. In addition, the employer is liable for any asset insufficiency under ERISA's termination insurance program. In a context in which the employer bears the financial risk, there is no justification for giving employees a veto power or equal control over the pension fund.

- Current law requires all plan trustees to act solely in accordance with ERISA's fiduciary standards, which require, among other things, that trustees act prudently and for the exclusive purpose of providing benefits to participants and beneficiaries. By contrast, the bill requires plan trustees to represent separate constituencies with separate interests. This approach inevitably encourages advocacy of disparate interests, compromising and weakening ERISA's fiduciary standards. Because they are not responsible for the financial status of the plan, employee representatives may be, and indeed have been, motivated by a political, social, or other agenda that is extraneous to the pension fund's welfare. This will impair the sound fiscal management of the pension fund and could put the employer at substantial risk.

- Although joint administration might be appropriate in certain industries, where multiemployer plans provide pensions to employees who frequently move from one participating employer to another, and where plan trustees specify the level of pension benefits on an industry-wide basis, the same considerations do not apply to a plan for which a single employer establishes the level of pension benefits and bears all of the financial risk.

- By mandating employee elections for nonbargained plans, the bill injects the potentially divisive element of employee elections into an employment environment. "Popularity contest" elections are wholly inappropriate and disruptive of normal and healthy employer-employee relations. Congress considered a similar election proposal in connection with the plant closing legislation that it enacted in 1988; Congress rejected the employee election proposal then, and it should do so now.

- Current law provides that the selection of plan trustees must be made in accordance with ERISA's standards of fiduciary responsibility. In the case of a nonbargained plan, the bill substitutes election politics for the exercise of fiduciary judgment, contrary to ERISA's fiduciary standards.

- When a plan covers both union-represented and nonrepresented employees, the bill, in direct conflict with Section 7 of the National Labor Relations Act, authorizes a union to represent the interests of the nonunion employees, who have had no voice in selecting the union and who may oppose it. A union cannot properly represent, and should not be authorized to represent, the interests of employees who are not members of the collective bargaining units that the union represents.

- The bill will create confusion and invite employee conflict, since it fails to provide a selection mechanism for plans that cover employees who are represented by a number of different unions that are unable to agree on a plan trustee.

- The Taft-Hartley Act requires joint administration of an employee benefit plan by management and union trustees in order to allow the employer's contributions to the plan to qualify for an exception to a criminal prohibition against employer payments to employee representatives. The rationale of the Taft-Hartley exception is wholly inapplicable to an employer-administered plan, and it therefore makes no sense to apply it where the employer is solely responsible for appointing the plan's trustees and administrators.

- In many cases, the plan trustee is primarily a custodian that acts only in accordance with directions given by investment managers and named fiduciaries. In these cases, the appointment of a joint board of trustees will be a meaningless gesture.

- The joint trusteeship proposal will not have the effect of discouraging plan terminations. Termination decisions are made by plan sponsors, not by plan trustees.

ERIC . . . . MEMORANDUM

THE ERISA INDUSTRY COMMITTEE

1726 M Street, N.W., Suite 1101, Washington, D.C. 20036 (202) 833-2800 FAX 202/833-1026

"The Employee Pension Protection Act of 1989"
S.685/H.R.1661

FACT SHEET ON TERMINATION-REVERSIONS

S.685/H.R.1661 prohibits an employer from terminating a defined benefit plan unless the employer first provides additional, unearned benefits to active and former plan participants and their beneficiaries. These new mandated benefits are in addition to the earned benefits that the employer has promised to provide.

The bill also provides that, before an employer may recover excess assets from a given plan, all other unrelated plans maintained by the employer and its affiliates must be brought up to a funded level sufficient to pay all liabilities to participants and beneficiaries. Unrelated plan funding is triggered regardless of whether the funding of the unrelated plans is dictated by union agreements, government contract restrictions, or Internal Revenue Code limits on the tax deductibility of contributions.

S.685/H.R.1661 (the bill) will inflict harm on employees, retirees, and beneficiaries and on pension plans in general. We oppose the legislation for the following specific reasons:

- The bill undermines the long standing presumption that, because an employer backs up the pension plan promise and bears all the risk of the plan's investment experience, assets in excess of what is necessary to pay the plan's promise are to be returned to the employer on termination of the plan.

- **The bill would impose new federally mandated pension benefits upon private-sector employers. The bill is a back-door effort to mandate cost-of-living increases for all retirees and beneficiaries, to the detriment, in many cases, of active employees.**

- **By mandating new pension benefits which have not been promised or earned, S.685/H.R.1661 will deter sound funding, reduce employees' retirement security, discourage the formation and expansion of new defined benefit plans, and subject the Pension Benefit Guaranty Corporation to substantial new financial hazards.**

- **The Joint Committee on Taxation and the Congressional Budget Office have determined that S.685/H.R.1661 would cost the Treasury $1.7 billion over a six year period. Over three years the bill would "lose" some $800 million. Accordingly, offsetting revenue would have to be raised elsewhere, including cutting back specific education, health, and employment programs in order to pay for legislation that on its own will do more harm than good.**

over [illegible]

- Although the bill purports to give an employer the opportunity to recover a portion of a terminated plan's excess assets, in fact, the bill precludes most, if not all, employers from recovering any excess assets from a terminated plan.

- If S.685/H.R.1661 or similar "pension gift" legislation were enacted, unions, elderly groups, and others would argue that employees were entitled to benefits in excess of those provided for in the plan regardless of whether there were excess assets. Thus, employers could be liable for projected benefit liabilities in virtually every situation short of retirement.

- A gift provision would undermine efforts of employers who are seeking to transfer excess pension assets to a retiree health trust. By "eating up" excess pension assets and creating new liabilities, S.685/H.R.1661 would seriously impair the ability to reduce liabilities for retiree health care. Many employers would curtail retiree health plans offered to new hires as well as reduce benefit liabilities for current employees.

- The bill requires terminating plans to eliminate employees' valuable lump-sum distribution rights, contrary to the anti-cutback provisions of the Internal Revenue Code and ERISA.

- The bill is completely inconsistent with existing legal requirements that apply to employers who contract with the Federal Government, putting a government contractor in the position of being required to give all of a plan's excess assets both to the Federal Government and to its own employees at the same time.

- In addition, the "top-up" requirement that the bill imposes on an employer's other plans will give windfall benefits to employees who are covered by plans that are completely separate (and many of which have been collectively bargained) from the plan that is being terminated.

- The bill imposes draconian penalties on the fiduciaries of a plan that violates the bill's requirements even if the fiduciary had no responsibility for, or knowledge of, the violation. The bill even imposes liability on an individual who ceases to be a fiduciary before the violation occurs.

- The bill raises but fails to resolve serious federal income tax issues that should be addressed by the Senate Finance and House Ways and Means Committees.

ERIC: July 6, 1989 U:T

Senator **Metzenbaum**. Thank you very much, Mr. Short.

Mr. Kevin McCarthy, vice president of UNUM Life Insurance Company of Portland, ME.

I am happy to say to you, sir, that until I had started preparing for these hearings I hadn't heard much about your company but what I have heard has been very complimentary. And since I don't always say that about all the insurance companies in this country I am happy to single you out for that complimentary observation.

Mr. **McCarthy**. Thank you very much.

Mr. Chairman, I appreciate the opportunity to prepare and present before your committee this morning testimony concerning S. 1511. As you noted, my name is Kevin McCarthy, and I am the second vice president of long-term disability.

Senator **Metzenbaum**. Senator Jeffords thinks you may be thrown out of the industry now after that compliment. [Laughter.]

Mr. **McCarthy**. It's possible.

I am the second vice president, as you noted, of long-term disability products markets for UNUM Corporation.

As Senator Cohen noted earlier, UNUM Corporation is the Nation's leading provider of long-term disability insurance. We provide LTD to more employers than any other insurer in the United States. In fact, we insure three million workers in over 28,000 group long-term disability policies.

S. 1511 was introduced to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act. We generally support this intent in S. 1511 for the following reasons:

From an insurer's perspective, which is to note that employers may have other issues besides insurance, group LTD coverage can be provided to older workers and cost-justified under ADEA as clarified by this legislation and as modified by our proposals, which are included in the statements that we submitted.

UNUM has worked closely with the Department of Labor in the past in establishing age-based, reducing benefit duration schedules in group LTD plans that comply with ADEA. In May of 1979 the Department of Labor cited our reducing benefit duration schedule as an example of a cost-justified age reduction benefit schedule.

Let me give you a simplified example of how one of these schedules works:

If an insured worker is disabled prior to age 60 the worker receives long-term disability benefits until age 65, which is the normal expected retirement age, but not less than 5 years as long as they remain disabled. If they are disabled at age 60 or after, the worker must have approximately equal cost expended on their long-term disability coverage. Therefore we extend the coverage beyond age 65 but reduce the duration of benefits to avoid increases in costs.

For example, if an insured worker is disabled at age 63, the worker will receive full benefits, that is, the same level of benefits as for younger workers, for 3 years. If an insured worker is disabled at age 65, the worker receives full benefits for 2 years. If disabled at age 67, full benefits for 18 months. If disabled at age 69 or over, full benefits for 1 year.

These graduated benefit duration reductions correlate to the increase in cost to the employer for providing long-term disability coverage to older workers. The age-related cost justification methods involved in establishing our schedules in the industry's safe harbor, as allowed by ADEA in the Department of Labor's 1979 Interpretive Bulletin, have proved to be valid, reasonable and workable. Our schedules are valid because any disability claims data that we can analyze demonstrates that the schedules we developed comply with the ADEA in the Interpretive Bulletin.

Our schedules are reasonable and workable because after the ADEA became effective and we had developed a set of reducing benefit duration schedules in compliance with the ADEA in the Interpretive Bulletin, virtually all of our 28,000 group LTD policy holders adopted one of our compliance schedules without objecting to the designs or the costs associated with those benefits for older workers.

Also, no insured employee has indicated to us that the benefits received under our schedules are unfair or discriminatory.

Although my area of expertise in testimony focuses primarily on long-term disability insurance, I would like to note that our group life insurance division in our company concurs with this testimony as well.

We do, however, offer technical clarifications to S. 1511 in our written statement which we believe will serve to avoid increased litigation and incorrect interpretations of ADEA.

I would like particularly to emphasize that the approximate equivalency standard of cost comparison between younger and older employees used in subsection (d)(3) of the section 1625.10 of the Code of Federal Regulations should be the standard that this bill intends when it states that the actual amount of payment made for cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker. In other words, the no-less-than-cost comparison language in the ADEA will mean the approximate cost equivalency comparison standard established in that section.

Thank you very much for your time and consideration, and I would be pleased to answer any questions at the end of the testimony. Thank you.

[The prepared statement of Mr. McCarthy follows:]

PREPARED STATEMENT OF THE UNUM CORPORATION
KEVIN MCCARTHY, SECOND VICE PRESIDENT

Mr. Chairman, I appreciate the opportunity to appear before your Committee today concerning S. 1511. My name is Kevin McCarthy. I am the Second Vice President of Long Term Disability Products/Markets for UNUM Corporation.

UNUM Corporation and its family of insurance companies (UNUM) is the nation's leading provider of group long term disability insurance. Based in Portland, Maine, UNUM provides group long term disability insurance to more employers than any other insurer in the United States. UNUM insures approximately three million workers under 28,245 group long term disability policies.

S. 1511 was introduced to restore the original Congressional intent in passing and amending the Age Discrimination in Employment Act (ADEA). We generally support this intent and S. 1511 for the reasons I will now discuss.

From an insurer's perspective (which is to say that employers may have other issues) group long term disability coverage can be provided to older workers and cost-justified under the ADEA as clarified by this legislation and as modified by our proposed recommendation which I will discuss shortly.

UNUM has worked closely with the Department of Labor in establishing age-based reducing benefit duration schedules in group long term disability plans that comply with the ADEA. In May, 1979, the DOL cited our reducing benefit duration schedule as an example of a cost-justified age reduction benefit schedule. Let me give you a simplified example of how one of our reducing benefit duration schedules works.

If an insured worker is disabled prior to age 60, the worker receives long term disability benefits until age 65, but not less than five years. Workers who are disabled at age 60 or older must have approximately equal costs expended on their long term disability coverage. Therefore, we extend their coverage beyond age 65 but reduce the duration of benefits to avoid increases in costs. For example, if an insured worker is disabled at age 63, the worker will receive full benefits (i.e., same benefit level as for younger workers) for three years. If an insured worker is disabled at age 65, the worker will receive full benefits for two years. If an insured worker is diasabled at age 67, the worker will receive full benefits for eighteen months. If an insured worker is disabled at age 69 or over, the worker will receive full benefits for one year. These benefit duration reductions correlate to the increase in costs to the employer when providing long term disability coverage to older workers. The age-related cost justification methods involved in establishing our schedules and the industry's safe harbor (as allowed by the ADEA and the Department of Labor's 1979 Interpretive Bulletin) have proved to be valid, reasonable and workable.

Our schedules are valid because any disability claims data we can look at demonstrates that the schedules we developed comply with the ADEA and the DOL's Interpretive Bulletin.

Our schedules are reasonable and workable because after the ADEA became effective and we developed a set of reducing benefit duration schedules in compliance with the ADEA and the DOL's Interpretive Bulletin, all of our 28,245 group LTD policyholders adopted one of our schedules without objecting to the additional cost of coverage for older workers provided by the schedules. Also, no insured employee has indicated to us that the benefits received under our schedules are unfair or discriminatory.

Although my area of expertise and my testimony focuses on long term disability insurance, our group life insurance division concurs with this testimony.

We do, however, offer the following recommendation on S. 1511 to avoid increased litigation and incorrect interpretations of the ADEA:

INCORPORATE SPECIFICALLY SUBSECTIONS (d)(1), (d)(2), (d)(3), AND (f) OF SECTION 1625.10, TITLE 29, CODE OF FEDERAL REGULATIONS (CFR) INTO THE ADEA RATHER THAN INCORPORATING SECTION 1625.10 IN ITS ENTIRETY.

These are the subsections relevant to the intent of S. 1511 and address cost data and cost comparisons made on a benefit-by-benefit basis and a benefit package basis.

We understand that the intent of referencing Section 1625.10 of the CFR in S. 1511 is to incorporate into the ADEA those subsections applicable to and permitting individual benefit and benefit package cost comparisons. However, by referencing the entire 1625.10 section, a court, employer, or insurer could determine that the entire 1625.10 section is incorporated into the ADEA. This presents the following problem:

Section 1625.10 Defines The Term "Subterfuge".

Subsection (d) of Section 1625.10 of the CFR uses and defines the term "subterfuge". S. 1511 deletes the term "subterfuge" from §4(f)(2) of the ADEA. S. 1511 does this by adding a new subsection to the ADEA, §4(f)(2)(B), which states that a bona fide employee benefit plan is not unlawful

> if the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." However, by referencing the entire 1625.10 section, S. 1511 incorporates into the ADEA not only the term it seeks to delete, but also a subterfuge definition that is different from the language in §4(f)(2)(B) stated above.

Therefore, by specifically incorporating subsections (d)(1), (d)(2), (d)(3), and (f) of Section 1625.10 of the CFR, S. 1511 accomplishes the following:

1. Avoids possible statutory interpretation problems created by incorporating the term "subterfuge" and its accompanying definition found in subsection (d) of Section 1625.10 of the CFR into the ADEA.

2. Clarifies that the "approximate equivalency" standard of cost comparison between younger and older employees used in subsection (d)(3) of Section 1625.10 of the CFR is the standard S. 1511 intends when it states in §4(f)(2)(B) of the ADEA that the "actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker." (Emphasis added.) In other

words, the "no less than" cost comparison language in the ADEA means the "approximate equivalency" cost comparison standard established in subsection (d)(3) of Section 1625.10 of the CFR.

I would be pleased to respond to any questions the Committee Members might have.

Senator **Metzenbaum**. I will have some questions at the end of the testimony.

Our last witness is Mr. Douglas McDowell, of McGuiness & Williams, of Washington, DC.

We are happy to have you with us.

Mr. **McDowell**. Thank you, Senator.

I appreciate the request of the committee to testify today. I am a partner with McGuiness & Williams, and that is a labor law firm. I have been practicing management-side labor law for the past 18 years and as a result have encountered a number of age employer issues.

I might add that I am also the general counsel of the Equal Employment Advisory Council, and you had a question earlier about the EEAC's position. EEAC doesn't testify, but I don't think they would mind if I briefly explained a bit later what the position was on the Interpretive Bulletin that we filed in 1988.

I think I can reiterate what Mark Dichter said, and that is that the law really isn't very settled in this area, particularly with respect to section 4(f)(2) and more particularly with respect to the integration of benefits issue.

There was a lot of discussion in the *Cipriano* case of what was going on. The Second Circuit really threw up its hands and sent it back down to the District Court, and then the AARP and the EEOC got into a dispute over it. So I think that pretty well exemplifies the fact that the law here isn't particularly well settled.

On the integration issue itself, which is of particular concern to most employers, a little background might be helpful. In 1978 the Department of Labor proposed an Interpretive Bulletin that didn't have a benefit package approach at all. It was strictly on a benefit-by-benefit basis.

Employers fought to have the benefit package approach used for certain benefits and the integration of certain benefits, including long-term disability, and EEAC at that time filed comments which I can provide the committee, as also mentioned in my testimony or my statement. However, they fought to have age-based reductions allowed in long-term disability payments which UNUM provides. That was something employers fought for.

When EEOC asked for comments in 1988, it seemed that they were going to take away some of those protections that were in fact added in 1978 as a result of industry comments. We heard—anticipated the question—and we had heard from a number of people on questions on EEAC's position with respect to their comments they filed in 1988. We sent a letter to the commissioner and we explained the position fully. We sent copies to the committee, and I have got some here if you would like to have them along with our comments.

I might add, on the integration issue EEAC has filed briefs in the *Fulflex* case and the *Westinghouse* case and the *Borden*'s case and indeed in the *Betts* case, and we were on the opposite side of the issues of the AARP and EEOC. Therefore, I think there has been a consistent position there.

Also, with respect to early retirement programs, we share the concern of the EEOC that there would be an effect by this bill. Chris did a nice job of explaining the type of benefits that are available. What he didn't point out is that the position that he took in his testimony and his paper submitted to the House was that you can't have any age-based differentiations on those programs.

In other words, an employer couldn't say that only people 50 and above can take part in an early retirement incentive program and that might even apply to normal retirement age under this program. An employee who is 40 or 45 could take the package, go to another employer, take the present actuarial value of the benefit 20 years sooner than the employer anticipated, thus draining the funds down.

I think the problem of the integration issue is exemplified by a case involving USX up in Pennsylvania, and that was an offset case also, similar to the *Fulflex* case. The judge pointed out in that situation that if an employer has to pay severance and retirement benefits to all employees on a separate cost basis, the employer might simply decide that he can't afford the present rate of pensions plus severance and terminate all severance pay to its employees.

I really think, though, the issue is not who filed what when and what issue was posed at a certain time. The issue really is whether there are some good policy reasons for the integrated benefit approach. Those policy reasons are set forth in the comments that were filed by EEAC in 1978 and also filed in our Westinghouse brief.

And I might add, in the comments that the EEAC filed in 1988, the issue of severance pay was specifically addressed by the Commission, and our comments said there is no justification for ignoring the fact that severance pay and sick pay are part of the benefit package provided to employees. Instead, these benefits, in the view of both employer and employees, may counterbalance an age-based reduction in some other benefit.

I might also point out that when EEOC issued its rulemaking it said it should be noted that the rulemaking does not request comments regarding either pension benefits or early retirement programs, both of which will be addressed separately in the separate rulemaking only on retirement plans, Senator, only got into early retirement programs and had nothing to do with integration.

Therefore, the questions that were posed by the Commission were answered consistently with the position that EEAC took in 1978. But the commissioner really didn't ask the questions in the rulemaking that are very important and are being argued before the committee.

As I said, the letter we sent is there. If anybody wants to pour through the briefs, I would be happy to provide those also.

Thank you.

[The prepared statement of Mr. McDowell follows:]

PREPARED STATEMENT OF DOUGLAS S. MCDOWELL

Messrs. Chairmen and members of the Committees. Thank you for the invitation to testify on the impact of S. 1511, the Older Workers Benefit Protection Act. As a partner with the Washington, D.C., labor law firm of McGuiness & Williams, I represent employer clients on labor and employment law issues. This includes advice on compliance with the law, as well as in litigation.

I also am General Counsel of the Equal Employment Advisory Council (EEAC), a nationwide association of employers and trade associations. EEAC represents its members on equal employment issues by filing amicus curiae briefs in the federal courts and by submitting comments on proposed regulations with the federal EEO enforcement agencies -- primarily the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP). Since mid-1976, I have supervised the filing of more than 250 amicus curiae briefs, over 105 of which were filed with the U.S. Supreme Court.

As it relates to the issues before the Committee, EEAC filed an amicus curiae brief in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), and other cases with issues directly affected by this legislation.[1/] EEAC also filed comments with the Equal Employment Opportunity Commission (EEOC) regarding its Interpretative Bulletin (I.B.) on the ADEA relating to costs and benefits under employee benefit plans. 29 CFR § 1625.10. Comments were filed by EEAC both in 1978, after the ADEA was amended, as well as in 1988, when the EEOC requested comments on whether the I.B. should be modified in light of ADEA amendments since 1978.

As part of my practice, I have closely followed developments regarding S. 1511 and H.R. 3200. The debate to date raises several concerns about this legislation. Of particular concern are: (1) assertions that employees will be unprotected from invidious discrimination unless this legislation is quickly enacted; (2) the negative effect that this legislation will have on normal and early retirement programs; and (3) the disruption this legislation will have on well-established industry practices of integrating severance, layoff, and other benefits into their retirement programs.

[1/] EEOC v. Westinghouse Electric Corp., U.S. Supreme Court, No. 88-1170 (urging Supreme Court review); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984)(Westinghouse I); Abenante v. Fulflex, Inc. (1st Cir. Nos. 89-1179, etc.); and EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984). Furthermore, a number of the other cases in which EEAC has participated have involved the proper interpretation of the ADEA. See, e.g., Harbison-Walker Refractories v. Brieck, cert. dismissed, 109 S. Ct. 546 (1988); Trans World Airlines v. Thurston, 469 U.S. 111 (1985); Lorillard v. Pons, 434 U.S. 575 (1978); Shell Oil Co. v. Dartt, 434 U.S. 99 (1977). See also, McLaughlin v. Richland Shoe Co., 108 S. Ct. 1677 (1988) (standard for willful violations under the FLSA, Equal Pay Act and ADEA).

A. Assertions That Employers Will Cut The Benefits of Older Workers Are Unsubstantiated. The ADEA and Betts Still Provide Substantial Protections.

1. Employers Who Cut The Benefits of Their Workers Would Risk Legal Action and Alienating Their Workforces

Those of us who represent employers constantly are perplexed at the reaction of the advocacy groups to the Supreme Court's recent decisions. Unsupported assertions are being made that unless this legislation is passed, and passed quickly, employers will rush to take many well-established benefits away from older workers.

The demographics of the workforce suggest, however, that any employer who tried to take away those benefits would be foolhardy, at best. As the Department of Labor recently reported:

> [While the declining number of workers means that] companies will have to take steps to improve the dynamism of an aging workforce, it also means that companies that can attract and retain productive older workers will most successfully meet the challenge of a tight market for skilled labor.[2/]

Younger workers, also, would begin looking for another employer that would assure them that they would be able to keep the well-established benefits when they moved into the upper age brackets.

Also, surveys of older workers have indicated that

[2/] Opportunity 2000, U.S. Department of Labor, 1988, p. 147.

employers generally treat their older workers quite well, a point recognized by their older employees. In November 1985, the American Association of Retired Persons (AARP) surveyed the decisionmakers from a random sample of 400 companies. The AARP study made the point that:

> There are few if any signs of overt, systematic discrimination against older workers, and gatekeepers do not believe that new Federal regulation is necessary to protect the rights of older workers.[3]

Similarly, a 1986 survey concluded that only 6% of workers aged 40 and above reported they had experienced age discrimination, and only 5% of that 6% claiming discrimination actually took legal action against their employer.[4]

These statistics do not portray a picture of profit-conscious employers anxious to withdraw the benefits from their older workers. In any event, the ADEA and the Betts decision still provide many significant protections to employee benefits that should not be overlooked.

2. Section 4(a)(1) Protects "Compensation" And Other Terms And Conditions Of Employment

Section 4(a)(1) of the ADEA provides that it shall be unlawful for an employer:

> to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his

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[3] AARP, Workers Over 50: Old Myths, New Realities, 1985, at p. 5.

[4] AARP, Work and Retirement: Employees Over 40 and their Views, 1986 at 17.

> compensation, terms, conditions, or privileges of employment, because of such individual's age.

Any attempts to cut the salary or compensation of older workers thus are prohibited.

3. The Betts Decision Prohibits Benefits Discrimination In Nonbenefits Areas Such As Hiring, Constructive Discharge And Compensation

The Betts decision itself allows a victim of discrimination to prove that a discriminatory benefit plan "actually was intended to serve the purpose in some nonfringe-benefit aspect of the employment relation." 109 S.Ct. at 2868 (reduction of salaries of older workers would still be protected by Section 4(a)(1)). These prohibitions clearly would prevent an employer from cutting benefits to force its older workers to quit (i.e., a constructive discharge). Also, cutting benefits to discourage the hiring of older workers also is likely to be prohibited under the Betts rationale. Indeed, the primary purpose of the ADEA was to protect older workers from hiring discrimination.

A number of other benefits often provided by employers -- such as various insurance policies (life, dental, vision, homeowners, legal services), as well as vacation, sick pay accruals, and parking -- traditionally have been provided to all employees regardless of age. Indeed, there has been little litigation on these points. As pointed out below, however, the proposed bill goes far beyond pinpointing such benefits for protection.

4. Section 4(g) Protects Health Insurance From Age-based Discrimination

Among the specific benefits protections currently contained in the Act, Section 4(g)(1) protects health insurance benefits. It provides:

> For purposes of this section, any employer must provide that any employee aged 65 or older and any employee's spouse aged 65 or older shall be entitled to coverage any group health plan offered to such employees under the same conditions as to any employee, and the spouse of such employee under age 65.

This provision was added to protect older workers who chose to work beyond normal retirement age once the former age cap was eliminated.

5. Section 4(i) Protects Pension Accrual After Normal Retirement Age

Effective January 1, 1988, Section 4(i) prohibited employers with defined benefit plans from ceasing an employee's benefit accrual, or reducing the rate of an employee's benefit accrual, because of age. Employers with defined contribution plans are prohibited from ceasing allocations to an employee's account, or reducing the rate at which amounts are allocated an employee's account, because of age.

B. S. 1511 and H.R. 3200 Jeopardize Well-established Retirement Plans

For employers, a primary concern is the impact this legislation would have on employer programs where age-based distinctions traditionally have been an integral part of employee benefit programs. Another primary concern is the negative impact this legislation would have on nationwide, industrywide practices that provide benefits to workers on an integrated package, rather than an individual basis.

1. There Are Important Policy Reasons For Using Age-Based Distinctions In Retirement Plans

As set forth later in this testimony, we are concerned that, as drafted, the legislation would encourage attempts to eliminate any age-based distinctions in retirement plans, forcing employers to use only length of service or some other non-age criteria.

Age-based distinctions traditionally are used in retirement plans. For example, employers may limit ad hoc voluntary, early retirement incentive programs to persons over a certain age (e.g., age 55). The purpose of those distinctions is to limit the number of persons who elect to join the program. Oversubscription results in an unwanted outflow of trained employees, forcing the employer either to hire untrained workers, or to attempt to hire back workers who chose early retirement.

Normal retirement age -- usually set at age 65 -- sets a minimum age level at which an employee meeting other eligibility criteria (such as length of service) can retire and begin drawing benefits. Programs are funded in anticipation that reserves will not be drawn down until a fixed time in the future, and upon actuarial expectations as to how many employees will utilize the fund.

Most private employers set normal retirement age at age 65. Retirement after 20 years of service generally has been limited to the military, police and fire departments, and other public employers. Retirement based on length of service alone quite often is provided by such employers as a trade-off for lower pay, and a recognition for the hardships that prolonged employment can cause. Without the option of retiring after 20 years, public employers and the military realize they would have trouble hiring and retaining employees. Private employer service-related retirement plans, such as 30-and-Out in the auto industry, became domestic industry patterns adopted before the intense level of foreign competition experienced today.

2. Age-based Retirement Distinctions Have Been Targeted by ADEA Plaintiffs

Plaintiffs are on record as arguing that age-based distinctions in retirement plans should not be permitted by the ADEA. For example, in several cases, younger plaintiffs have attacked early retirement incentive programs limited to workers a certain age and above.5/ Also, in its

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5/ See, e.g., Mason v. Lister, 562 F.2d 343 (5th Cir. 1977)(federal early retirement); Wehrly v. American Motors Sales Corp., 678 F. Supp. 1366 (N.D. Ind. 1988)(younger worker

comments to the EEOC on the 1988 Advance Notice of Proposed Rulemaking (ANPRM), the AARP argued that "the use of early retirement incentive programs is inconsistent with national older worker employment policy." [6] AARP also urged the following:

> These congressional policies [protecting older workers] are, in large measure, frustrated by the frequency and prevalence of corporate use of early retirement incentive programs. Any rulemaking undertaken by the Commission should frown upon the use of these programs. [7]

Similarly, testimony at last Thursday's House hearings indicated that while advocates of this legislation would not oppose retirement incentives based upon lump sum payments, additional service credits, or across the board percentage increases in retirement payments, it was stressed repeatedly that such incentives would have to be "without regard to age." [8] Witnesses for the proponents at the House hearings also opposed the EEOC's call for an amendment to the bill

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excluded from special retirement program); Nolan v. Otis Elevator Co., 102 N.J. 30; 505 A.2d 580, 40 FEP Cases 281 (N.J. Sup.Ct.(1986)(same); Rock v. MCAD, 424 N.E.2d 244, 41 FEP Cases 1351 (Mass. 1981)(group of younger workers sue to receive early retirement benefits given to those 55 and older).

[6] November 15, 1988, comments of the AARP at 24 (emphasis added).

[7] Id., at 25.

[8] See September 21, 1989, testimony of Christopher Mackaronis, at 29-32.

that would protect early retirement programs. [9]

3. The EEOC Feels This Legislation Jeopardizes Early Retirement Programs And Has Urged A A Corrective Amendment

At last week's House hearings, EEOC officials testified that this legislation should be amended to protect early retirement programs. Their concern seemed to be based upon two language additions this legislation makes to the ADEA.

First, Section 4(a)(1) -- which contains a categorical prohibition of age distinctions -- is amended to include "all employee benefits." (Emphasis added). As explained by the EEOC's General Counsel, an age differentiation in an early retirement program would satisfy the age discrimination component of Section 4(a)(1) unless it fell within the new Section 4(f)(2)(B), which requires a cost justification for this age distinction. As explained above, age distinctions in retirement plans, for the most part, are based on legitimate business considerations other than age.

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[9] It should be noted that a recent 1988 survey found that "those employed by companies with pension plans can hardly wait to leave the workforce. . . ," and "most workers will leave these jobs and the world of work as early as possible." Retirement Experience 1979-1988: Employee Decisions That Confound Federal Laws, Spencer's Research Reports, Report 119.0, April 1989, at pp. 2 and 5. Spencer reported that in 1986, 83.9% of total retirements were taken early. In 1988, 76.4% were early retirements. Id., at p. 2.

Similarly, a 1986 survey of workers age 40 and older found that 41% indicated they would be "likely to accept incentive offers for early retirement." That figure rose to 47% for employers with over 1000 employees. See, AARP, Work and Retirement: Employees Over 40 and Their Views, 1986, at p. 20. 67% responded that employer incentives to retire early were "very" to "somewhat" important in encouraging early retirement. Id., at 19.

Witnesses supporting the legislation, however, disputed the EEOC's analysis and opposed any amendment to the bill.

4. The Legislation Also Could Jeopardize Normal Retirement Ages

At the House hearings, Representative Steve Gunderson asked the EEOC if the bill would have any effect on normal retirement age or minimal age for early retirement. The response was that Section 4(i) of the ADEA protects normal retirement age, which is true to a limited extent. But it is hard to see why many younger employees with sufficient service credits who would sue to get into an ad hoc early retirement incentive program at age 55 would not, given the chance, sue to begin drawing out normal retirement benefits before age 65 as would be permitted by S. 1511.

Section 4(i) does not provide a blanket endorsement of normal retirement age. Instead, Section 4(i)(8) provides:

> A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title [ERISA] and section 411(a)(8)(B) of title 26 [Internal Revenue Code]. (Emphasis added).

Under existing ADEA provisions, Section 4(i)(8) probably would protect normal early retirement age. S. 1511, however, would install a mandatory cost defense for age-related distinctions, thus raising serious questions about the use of normal early retirement age.

Section 4(i)(8) states that a retirement plan does not violate the ADEA "solely" because it provides a normal retirement age. But assume a 45-year-old plaintiff used the S. 1511 amendment to argue that he was not attacking normal retirement age *per se*, but use of a normal retirement age that could not be justified by a cost defense. The plaintiff could argue that 4(i)(8) is no defense because the existence of a normal retirement age requirement is not the "*sole*" reason for the lawsuit. Rather, the suit is based upon:

- use of a normal retirement age
- that cannot be justified by valid cost factors.

The employer's failure to meet the cost defense thus negates the Section 4(i)(8) defense. This obviously is a technical argument, but it is relatively simple compared to some of the plaintiffs' cases that have been brought under Section 4(f)(2).

Given new, broad, antidiscrimination language contained in S. 1511, Section 4(i)(8) may have to be read to protect only those normal retirement ages that otherwise comply with the ADEA. The underlying purpose of Section 4(i)(8) thus becomes relevant. It is unlikely the provision was added to protect normal retirement age from ADEA attack, because -- prior to S. 1511 -- neither the plaintiffs nor the EEOC had ever questioned its use. Existing ADEA language seemed dispositive. Rather, the provision apparently was added to overcome some potential technical problems that the pension accrual amendments might have created for the use of normal retirement age. Also, it should be stressed that Section 4(i) was not enacted in 1967 when the ADEA became law. Rather, it was enacted in 1986 as part of a technical package of amendments regarding pension accrual.

This conclusion is borne out by the legislative history of the 1986 amendments, which gives several examples of how the bill still permits the use of normal retirement age. The legislative history indicates several purposes of Section 4(i)(8), all of which relate to pension accrual:

> * to allow an offset of defined benefit plan payments because of a delay of payments after attaining normal retirement age;
>
> * to allow a similar offset for plans that provide for payment of benefits before separation, but after attaining normal retirement age; and
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> * allowance of some variance in the rate of benefit accrual depending on the number of years of service an employee may complete between the date of hire and the attainment or normal retirement age.

Leg. Hist. of P.L. 99-509, 1986 U.S. Code Cong. & Admin. News 4024. Thus, if S. 1511 were enacted, these technical purposes of Section 4(i)(B) would be satisfied, because they would be applied to normal retirement ages -- but only those that passed the cost justification defense. If the employer could not "cost justify" the age differential, however, Section 4(i)(8) of itself would not protect the plan.

Obviously, neither employers nor EEOC would want these arguments to succeed. However, employers and EEOC both want to preserve early retirement programs, but that has not stopped plaintiffs from attacking such programs under present law. Nor did such concerns prevent the drafters of S. 1511 from introducing a statute which, according to EEOC, needs to be changed to protect early retirement programs.

C. S. 1511 Would Not Allow Employers and Unions To Consider Benefits As Part of An Integrated Package Of Benefits. The Cost Of Each Benefit Would Have To Be Considered Separately. Common Industry Practice Would Be Jeopardized Without Sufficient Public Policy Justification

1. Industry Comments On the I.B. And Positions in Litigation Consistently Have Opposed Denying Use Of The Benefit Package Approach To Retirement And Pension Plans

Presently, the EEOC's Interpretative Bulletin provides that the benefit package approach does not apply to a retirement or pension plan. 29 CFR Section 1625.10(f)(2)(ii). The cost of retirement benefits has to be considered separately; the total package of benefits given to retirees cannot be considered, even though older workers may be provided equivalent or greater actuarial value when viewing all benefits as a package.

Employers generally do not accept the EEOC's interpretation, and the courts are split over whether present law allows the ADEA presently allows the integration of benefits. One of the reasons EEAC filed a Supreme Court brief in EEOC v. Westinghouse Electric Corp., No. 88-1770, was to urge the Court to reject the EEOC's position and resolve this split of authority. Also, EEAC filed several briefs urging that it was permissible for an employer to integrate its retirement and pension benefits with other benefits and consider them as a package. See the Westinghouse, Borden's and Fulflex cases cited above on p. 2, n. 1.

Assertions may be made to the Committee that in commenting on the Department of Labor's proposal to change the I.B. in 1978, employers did not object to excluding retirement and pension plans from the benefit package approach. Such assertions are incorrect. Initially, the Department's proposal would have allowed the cost justification for all benefits to be applied only on a benefit-by-benefit basis. 10/ Comments from industry strongly opposed that approach.

Indeed, the comments filed by the Equal Employment Advisory Council strongly urged that the benefit package approach should be applied to all benefits, including retirement and pension benefits. EEAC's comments stated as follows:

> 1. Should Cost Comparisons be Made on a "Benefit Package" or "Benefit-by-Benefit Basis"?
>
> Section 860.120(d)(2) of the proposed amendments requires that cost comparisons be conducted strictly on a benefit-by-benefit basis. According to the preamble this approach is both workable and consistent with the general

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10/ See 43 Fed. Reg. 43264, 43265-66, September 22, 1978.

> policy of treating employees as individuals regardless of age. Unfortunately, it reflects little concern for the long-standing industry practice of organizing interrelated benefits into packages which afford maximum employee protection at a reasonable cost.
>
> Implicit in the benefit-by-benefit approach is the assumption that the four covered plans--life and health insurance and long-term disability and retirement programs--constitute independent and unrelated benefits. This is simply an unwarranted assumption. Industry has long recognized that duplication of benefits and excessive cost can only be avoided by merging several related programs into benefit-oriented packages. Death and income replacement benefits are two examples.
>
> * * *
>
> The proposed benefit-by-benefit approach to cost analysis would undermine the continued viability of such benefit-oriented packages to the detriment of both employers and their covered employees. The financial and administrative burdens imposed upon employers resulting from duplicative rather than complementary coverage is self-evident. However, employees no less than employers would be adversely affected. The benefit needs of employees vary greatly with age. Younger employees, for example, are concerned about preserving the financial integrity of their families in the event of premature death or long-term disability. Since alternative sources of income are rarely adequate, heavy reliance must be placed upon life insurance and disability protection. In contrast, older workers are more concerned with insuring an adequate income during a prolonged retirement. Employer-sponsored death and retirement benefits available to the employee and surviving dependents lessens the need for substantial life insurance coverage.

EEAC comments at 7-8 (emphasis added).

EEOC's 1988 Advance Notices of Proposed Rulemaking (ANPRM) did not deal with the issue of whether the benefit package approach should be applied to retirement or pension plans. The ANPRM on employee benefits stated:

> It should be noted that the ANPRM does not request comments regarding either pension benefits or early retirement programs, both of which will be addressed in separate

proceedings.

53 Fed. Reg. 26780, July 15, 1989. The separate ANPRM, however, addressed only early retirement plans, and did not mention the cost defense, or the integration of severance, insurance or other benefits into retirement plans. See 53 Fed. Reg. 26788, July 15, 1989.

2. The Integration Issue Is Extremely Important to Employers Generally

Our experience with this issue indicates that this is a problem of nationwide concern that cuts across many industries. Post-retirement systems of this kind are common in American industry. Many of the Fortune 200 companies are from various industries (including steel, electronics, auto, oil, rubber, telecommunications, canning, and meatpacking) that would be affected directly. Indeed, Section 4(k) of the bill states that "[a] seniority system or employee benefit plan shall comply with this Act regardless of the date of adoption of such system or plan."

In several contexts, and for many years, employers have sought to provide integrated packages of fringe benefits designed to meet the individual needs of employees that are consistent with the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq. These valuable benefits can include life and health insurance, disability income, sick leave, paid vacations, and post-employment income. Many of these employers have planned to provide post-employment income, particularly in the event of a plant closing, to guarantee their longest-working employees a continual stream of income until death as well as a "safety net" in the event of involuntary termination without fault. Perhaps the most common benefit is a retirement pension, a lifetime income generally provided to employees who have satisfied minimum service requirements and attained retirement age. In addition, many employers have elected to provide a lesser benefit, known as "separation" or "severance" pay, to employees who lack the eligibility requirements for a pension.

Many of the policies that would be affected by this legislation involve employer practices designed to protect employees from the economic impact of layoffs where jobs are being consolidated or eliminated. They involve employer policies that go beyond any legal requirement and provide a post-employment flow of income to those employees affected by the business downturn. Both special early retirement pensions and severance payments are designed to protect employees against ad hoc contingencies which may or may not occur, such as plant closings or reductions in force.

Many companies establish both their post-employment retirement and severance policies at the same time and maintain them on an ongoing basis. Others are prompted by unforeseen economic downturns to establish severance plans for persons not previously covered, or to extend coverage where appropriate. Often, when an industry experiences a downturn and layoffs are necessary, economic circumstances make it exceedingly difficult for many employers to pay any and all severance payments to those who have previously been covered by enhanced post-employment pension benefits.

Under the view of the EEOC, those extra payments also must be made to retirement-eligible workers who have already been provided an equivalent or more valuable post-employment income package. This approach poses a great risk for the continued use of such programs at their present level. As one court has explained:

> ...EEOC's position causes no little concern for the plight of employees subject to layoff in the future. Since layoffs are usually the result of employers cost-cutting measures in years of economic decline, [an employer] may simply decide that it cannot afford both the present rate of pensions plus severance and terminate all severance pay.

EEOC v. USX Corp., 10 EBC 2341, 2350 n.15 (E.D. Pa. 1989)(emphasis added).

In these situations, the responsible employer will attempt to provide benefits to the greatest number of employees, with due regard to the amount of available funds. Employers would be concerned, however, if a benefit could be held to be age-discriminatory merely because older employees receive this continued income as part of a retirement program rather than through a severance package designed for workers not eligible for retirement. If older workers must receive the greatest benefits under each portion of a package dissected into its component parts, a considerable number of established, and often collectively bargained, benefit plans will fail, and in many cases, some of the benefits will be eliminated because of greatly increased, and unanticipated, costs.

D. Conclusion

S. 1511 and H.R. 3200 put at risk many well-accepted industry practices, including use of age-related retirement programs and the integration of all benefits when determining the relative cost of benefits made on behalf of younger and older workers.

September 27, 1989

Senator **METZENBAUM**. Thank you very much, Mr. McDowell.

The letter of the Equal Employment Advisory Council of October 12, 1988, will be included in the record.

[The letter of the Equal Employment Advisory Council follows:]

EQUAL EMPLOYMENT ADVISORY COUNCIL
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1015 FIFTEENTH STREET, N. W.
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October 12, 1988

Ms. Cynthia Matthews
Executive Secretariat, EEOC
2401 E Street, N.W.
Washington, D.C. 20507

Re: Advance Notice of Proposed Rulemaking
Employee Benefit Plans
29 C.F.R. Part 1625

Dear Ms. Matthews:

The Equal Employment Advisory Council (EEAC) welcomes the opportunity to file the following comments on the Equal Employment Opportunity Commission's Advance Notice of Proposed Rulemaking on employee benefit plans.

EEAC's membership comprises a substantial cross-section of employers and trade associations who are firmly committed to the goals of this nation's equal employment opportunity laws. Since its founding in 1976, EEAC has presented the views of employers generally to courts and agencies on a broad range of issues involving equal employment opportunities. Through its amicus curiae briefs and comments on proposed regulations, EEAC seeks to assist the courts and administrative agencies to interpret the relevant law and to recognize the practical impact of their decisions.

EEAC members are employers who maintain benefit plans for their employees. Thus EEAC's members will be affected if the EEOC chooses to conduct rulemaking and promulgate regulations directly affecting early retirement. EEAC is therefore pleased to respond to the EEOC's ANPRM of July 15, 1988.

I. THE DEPARTMENT OF LABOR'S INTERPRETATIVE BULLETIN SHOULD NOT BE SUBSTANTIVELY CHANGED EXCEPT WHERE JUSTIFIED BY LEGISLATIVE AMENDMENTS TO THE ADEA.

EEAC concurs that review of the Interpretative Bulletin (I.B.), first issued by the Department of Labor in 1969 and amended in 1979, is appropriate given the number of legislative changes to the ADEA since the last I.B. amendments. However, neither case law nor Congressional action justify revision of those portions of the I.B which were not affected by ADEA amendments. EEOC's past attempt to make specific alterations to the I.B. without a merely caused confusion in an area of settled law. The existing I.B., with few exceptions, has received the approval of Congress and the courts, and therefore should not be altered.

A. History of the I.B.

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 et seq., prohibits age discrimination with respect to "compensation, terms, conditions, or privileges of employment." § 4(a)(1). An exception to this general prohibition allows an employer "[t]o observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the [ADEA]." § 4(f)(2).

The ANPRM summarizes the development of the I.B. to its present form. The Department of Labor (DOL) issued the original I.B. in 1969, embracing an interpretation of § 4(f)(2) that was well-grounded in the legislative history of the ADEA. Pursuant to § 4(f)(2), the 1969 I.B. authorized the provision of lesser benefits to older workers under an employee benefit plan so long as similar costs were incurred on behalf of older and younger workers.

When § 4(f)(2) was amended in 1978 to prohibit involuntary retirement, Congress endorsed the "equal cost" principle. During discussion of the Conference Report, Senator Javits quoted the I.B. almost exactly when reaffirming that the new amendments would not change existing law with regard to employee benefits, stating:

> The purpose of section 4(f)(2) is to take account of the increased cost of providing certain benefits to older workers as compared to younger workers. Welfare benefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers. Thus a retirement, pension or insurance plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits or insurance coverage.

124 Cong. Rec. S4450-51 (March 23, 1978) (emphasis supplied). Compare 29 C.F.R. § 860.120, quoted in ANPRM, 53 Fed. Reg. 26789-80 (July 15, 1988). Senator Williams, the majority manager of the proposed amendment, confirmed that Senator Javits' statement "accurately reflects congressional intent in this regard." 124 Cong. Rec. at S4451.

Thereafter, in 1979, the DOL amended the I.B. to provide further guidance on employee benefit and pension plans, building on the "equal cost" principle. The I.B. was retained when the EEOC assumed enforcement authority of the ADEA.

B. There is no justification for rescinding the "equal cost" principle."

Although Congress has amended other portions of the ADEA in the past ten years, § 4(f)(2) has remained untouched. Thus, there is no basis for changing the previous position, which is reflected in the existing I. B. Moreover, a number of appellate courts have adopted with approval the I.B.'s "equal cost" principle. See, e.g., Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692 (6th Cir. 1988) (affirming grant of summary judgment when employer failed to show economic justification for denying disability retirement to employees over 60); EEOC v. City of Mt. Lebanon, Pennsylvania, 842 F.2d 1480, 46 FEP Cases 857 (3d Cir. 1988) (employer must demonstrate age-related cost factors as applied to plan chosen); Karlen v. City Colleges of Chicago, 837 F.2d 314, 319 (7th Cir. 1988)("close correlation between age and cost").

The economic basis underlying § 4(f)(2) -- that some benefits are more costly to provide to older workers -- is as valid today as when the ADEA was enacted. Thus, there is no justification for making any substantive changes to the guidance provided by the I.B. other than in those areas where the ADEA has been specifically amended by Congress.

C. The EEOC Has Had Little Success In Changing The I.B. Without A Clear Congressional Mandate.

When the EEOC has attempted to modify the I.B. in the absence of a direct Congressional mandate to do so, the tortuous course of the regulation has resulted in confusion and an outcome far different from that originally contemplated.

In the area of pension accruals, the 1979 I.B. clearly stated that post-normal retirement accruals, contributions or adjustments were not required. 44 Fed. Reg. 30,648 (1979) (codified at 29 C.F.R. § 860.120(f)(iv)(B)(1981) (now § 1625.10(f)(1)(iv)(B) (rescinded). This pronouncement was obviously in response to the unmistakably clear legislative history of the 1978 ADEA amendments where Congress plainly stated that pension accrual past normal retirement age would not be required. See, e.g. S. Rep. No. 493, 95th Cong., 1st Sess. 1 (1977) U.S. Code Cong. Admin. News 1978, p. 504, cited in Von Aulock v. Smith, 720 F.2d 176, 182 (D.C. Cir. 1983) (legislation does not require accruals beyond a plan's normal retirement age); H.R. Rep. No. 587, 95th Cong. 1st Sess. 9 (1977) (amendments do not require additional accruals beyond those required by ERISA). Additionally, in the congressional debates on the 1978 Amendments, Rep. Hawkins, and Senators Javits and Williams also stated that accruals were not required beyond normal retirement age. Von Aulock, 720 F.2d at 184.

Between 1980 and 1985, in the face of this clear legislative history, the EEOC inexplicably developed a number of proposals to rescind the above-cited portion of the I.B. and replace it with a provision requiring post-normal retirement accruals. This rulemaking effort was directly at odds with the 1978 legislative history and unnecessarily confused a policy that was based on a clear legislative mandate. When no final action was taken, the American Association of Retired Persons (AARP) filed AARP v. EEOC 655 F. Supp. 228 (D.D.C. 1987), rev'd on other grounds, 823 F.2d 600 (D.C. Cir. 1987). As a result, the pension accrual portion of the I.B. was rescinded by court order instead of notice and comment rulemaking, after Congress passed the Omnibus Budget Reconciliation Act, Pub. l. No. 99-509, §§ 9201-9204 (1986) amending the ADEA to require pension accruals. The recission, however, was not based upon the merits of the I.B.'s position on pension accrual, but rather on the EEOC's failure to formally adopt this new position on pension accrual that had no merit in the first place.

In light of this experience, the agency would do well to use extreme caution in disturbing policies that are grounded in clear legislative history supporting the I.B. The strong past history of Congressional and agency support for the equal cost principle is likely to mitigate against any attempt to change the I.B. under existing law.

II. CHANGES TO THE I.B. ARE APPROPRIATE WHERE CONGRESS HAS AMENDED THE ADEA.

In the limited circumstances in which the I.B. is inconsistent with the ADEA due to subsequent amendments, changes to the I.B. would be appropriate. For example, 29 C.F.R. § 1625.10(f)(1)(iv)(B) -- which indicated that pension accrual was not required for years worked after normal retirement age -- has been functionally rescinded by the addition of § 4(i) on pension accrual. Similar revisions should be made due to the 1986 removal of the age-70 cap.

Clearly, 29 C.F.R. § 1625.10(f)(1)(ii) regarding health insurance will require amendment since the addition of and amendments to § 4(g). In this regard, regulations similar to EEOC Policy Statement No. N-915-026 (5/12/88) would be justified.

III. RESPONSES TO SPECIFIC INQUIRIES

1. In General

1a. Which plans should be considered to be "employee benefit plans" under the ADEA?

As the I.B. instructs, any non-mandatory benefit other than wages or salary provided to employees by an employer (commonly called "fringe benefits") should be eligible for consideration as an "employee benefit plan." 29 C.F.R. 1625.10(b). In addition to those enumerated by Congress in § 4(f)(2), retirement, pension and insurance plans, this could include health care coverage (within the confines of § 4(g)), disability, severance pay, paid vacation and sick leave. And where reduction of benefits to older workers may be justifiable by age-based cost considerations, such plans also are to be considered "bona fide."

1b. What factor[s] should be assessed when determining the presence or absence of "subterfuge" under section 4(f)(2)? Should employee benefit plans which predate the ADEA be considered as meeting the lack of subterfuge requirement? If so, under what circumstances?

The issue of "subterfuge" is discussed in detail in the comments filed by EEAC in the concurrent rulemaking on early retirement benefits. Courts deciding cases under the ADEA have adopted the burden of proof scheme set forth by the Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and this analysis should be employed in cases raising the § 4(f)(2) defense.

Thus, after a plaintiff has made out a prima facie case, an employer raising § 4(f)(2) will have the burden, as in any other disparate treatment case, of articulating a legitimate, nondiscriminatory reason for its actions. Given the language and legislative history of § 4(f)(2), the employer's reason should be that it was acting pursuant to a bona fide employee benefit plan, and that the terms of the plan complained of resulted from the use of legitimate age-based cost factors.

The plaintiff will then have the opportunity under Burdine to demonstrate that the employer's proffered reason was in fact a "pretext for discrimination," in effect, a subterfuge to evade the ADEA. Here, the plaintiff can attack either the existence of a bona fide plan, or the specific cost factors.

The Supreme Court's decision in United Air Lines, Inc., v. McMann, 434 U.S. 192 (1977) conclusively establishes that employee benefit plans which predate the ADEA meet the "lack of subterfuge" requirement. Noting that "we find nothing to indicate Congress intended wholesale invalidation of retirement plans instituted in good faith before [the ADEA's] passage," the Court stated:

> In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion. In the context of this statute, "subterfuge" must be given its ordinary meaning and we must assume Congress intended it in that sense. So read, a plan established in 1941, if bona fide, as is conceded here, cannot be a subterfuge to evade an Act passed 26 years later. . . We reject any such per se rule requiring an employer to show an economic or business purpose in order to satisfy the subterfuge language of the Act.

434 U.S. at 203. Thus, when the benefit plan in question predates the Act, it is impossible for it to have been devised to evade a statute that did not yet exist. Accord, EEOC v. Cargill, ___ F.2d ___, 47 FEP Cases 1122 (10th Cir. 1988)(disability benefit plan instituted before enactment of the ADEA cannot be a subterfuge). A subsequent amendment to a pre-existing plan, if made after the effective date of the Act, should probably be treated as if it were contained in a plan developed after the Act. Thus, where a plaintiff has made a prima facie showing that such a subsequent amendment discriminates on the basis of age, the employer would be required to articulate a legitimate business purpose in adopting the amendment as it affects the plan.

Given the legislative history of the Act and the clear language of McMann as to the meaning of "subterfuge," this is an excellent example of an area which requires no intervention by the EEOC and is better left alone.

1c. Is the present "benefit package" approach adequate to meet problems arising from the impact of age on employment?

Section (d)(2) of the I.B. authorizes the use of either of two alternative approaches in determining whether age-related cost factors justify a reduction in a benefit provided to older workers. Under the "benefit-by-benefit" approach, each benefit is evaluated individually. In contrast, the "benefit package" approach permits employers to make cost comparisons and adjustments "with respect to section 4(f)(2) plans in the aggregate." 29 C.F.R. § 1625.10(d)(2)(ii). It thus "permit[s] deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees." 29 C.F.R. § 1625.10(f)(2) (emphasis in original). The "benefit package" approach cannot be applied to retirement or pension plans. 29 C.F.R. § 1625.10(f)(2)(ii).

The "benefit package" approach as it now exists is a necessary and important alternative to the "benefit-by-benefit" approach. It reflects the long-standing industry practice of organizing interrelated benefits into packages which afford maximum employee protection at a reasonable cost.

Industry has long recognized that duplication of benefits and excessive cost can be avoided only by merging several related programs into benefit-oriented packages, particularly when negotiating an overall premium package with insurance carriers. Moreover, for union-represented employees, fringe benefits invariably constitute a "bread-and-butter" issue at the bargaining table. Fundamental to successful negotiations, however, is the flexibility to engage in a give-and-take process in which some benefit levels are sacrificed in exchange for enhanced benefits elsewhere. The end result is generally a balanced benefit package which is responsive to the particular needs of the parties involved.

The "benefit package" approach is currently adequate and should not be altered. If the Commission is contemplating any revisions to the "benefit package" approach, EEAC respectfully requests the opportunity to comment in further detail prior to the issuance of final regulations, as it did in 1978 in comments to the Department of Labor when the I.B. was amended to take its present form.

1d. Should the Commission provide "safe harbors" (specific numerical examples of permissible plans) with respect to each type of employee benefit plan?

As a general rule, it would be helpful for the Commission to expand on the "safe harbors" now contained in the I.B. to provide further guidance to employers and employees alike. Care should be taken, however, that the new "safe harbors" are not presented as minimum standards or as exclusive examples of permissible plans, so that the new guidance does not inadvertently disapprove plans previously permissible under the existing I.B. or otherwise based on age-related cost considerations.

1e. How should "cost" be defined with regard to employee benefit plans, particularly with regard to group insurance plans?

This is another area in which no further regulation is warranted. 29 C.F.R. § 1625.10(d)(1) already contains a sufficient explanation of the minimum qualifications for cost data. Further refinement of the term would not be necessary or prudent. In this area, a wide degree of flexibility is required to encompass the myriad of fringe benefits being offered in today's workplaces. Particularly in the area of insurance, some employers offer a single health insurance plan with a specific benefit package, while others offer "cafeteria plans" allowing employees to select the benefits they desire. Still others offer employees a choice between a number of health care carriers and HMOs.

A more specific definition of "cost" in this instance may unduly restrict the provision of flexible benefit plans and would undoubtedly cause confusion. Since employers will, if challenged, be required to justify the plan offered with cost data, they should be allowed to present that data as it was considered by them, and not according to some arbitrary and generic definition of "cost."

1f. Is the "integration" of government provided benefits (such as Social Security) still viable, and if so, what specific issues should be addressed?

With the exception of 29 C.F.R. 1625.10(f)(1)(ii) regarding a "carve-out" approach to integration of Medicare and health insurance benefits, which was invalidated by the addition of § 4(g) to the ADEA, the "integration" of government benefits provided in § (e) of the I.B. is still viable and should not be disturbed. For example, integration of Social Security benefits and pension payments is specifically authorized by § 401(a)(5) of the Internal Revenue Code. Cf. Potenze v. New York Shipping Ass'n, Inc., 804 F.2d 235 (2d Cir. 1986), cert. denied, 107 S. Ct. 1955 (1987)(integration of guaranteed income benefit with Social Security is permissible under ADEA). Likewise, many plans providing disability income allow an offset for Worker's Compensation benefits. These provisions are routinely taken into account when determining the cost of the plan and the amount of benefits which the employer can afford to offer, and should not be overridden by unwarranted regulation, particularly since employers make direct contributions for Social Security, Workers' Compensation and other such government-sponsored programs.

2. Life Insurance Plans

2a. Does the five-year bracketing permitted in the 1979 I.B. accurately reflect insurance industry practice? Would other brackets be more realistic or preferable?

EEAC is not aware of any data that would tend to improve on the existing five-year bracketing. If any changes are made as part of this regulatory effort, EEAC cautions that they should be clearly identified as examples which are not exclusive and do not invalidate any plans permissible under the existing I.B.

2b. Does adequate data exist that would allow the Commission to develop satisfactory safe harbors relating to the specific percentages of decrease in benefits per age (e.g. a safe harbor could provide that a life insurance plan providing 100 units of coverage for persons in the 55-60 age bracket need only provide 90 units of coverage for persons in the 60-65 age bracket)?

EEAC has no specific data available that would support or hinder development of the safe harbors suggested. EEAC would support development of such safe harbors provided that they are clearly identified as examples which are not exclusive and do not invalidate any plans permissible under the existing I.B. For example, if a safe harbor provides that a lesser number of units of coverage is permissible for a certain age bracket, provision of that number of units should not be mandatory if the employer can demonstrate through adequate cost data that a lesser benefit is justified.

2c. What is the employer's obligation to older workers (e.g. those over 80) if life insurance is not commercially available?

A survey of EEAC's membership reveals that EEAC members presently have virtually no employees over 80, and very few even nearing that age. This may change, however, as experience develops after the lifting of the ADEA's age-70 cap.

It would seem that if life insurance is not commercially available due to a worker's advanced age, then the employer should be relieved of the obligation to provide life insurance even though it provides that benefit to younger employees. This problem, of course, is the ultimate extension of the insurance cost issue that was directly addressed in the legislative history. It was the immense cost of such insurance that concerned Congress, and the Commission does not have the authority to require employers to incur such costs in order to provide coverage to uninsurable employees.

Similarly, a requirement that employers provide an "equivalent" benefit to these employees is probably not feasible. Since the life insurance premium, were it available, would likely be prohibitively expensive, requiring the employer to pay the employee the cash equivalent would be the type of disproportionate benefit for which § 4(f)(2) provides a cost-related defense.

It may be that some employers will choose voluntarily to compensate these older employees using some approximation of the cost incurred by the employer in providing life insurance for younger employees. The "cost" factor could be determined by some type of "average cost" principle, and the benefit provided in either cash or some cash equivalent such as extra vacation or sick days. But given the ADEA's legislative history, the EEOC does not have the authority to compel such payments.

Given the legislative history of § 4(f)(2), which clearly excuses the employer from providing overly expensive benefits to older workers, perhaps this is yet another issue better left alone.

3. Long-term disability.

3a. In light of the lifting of the age 70 cap, are the safe harbors in the 1979 I.B. still valid?

Since the safe harbors in 29 C.F.R. § 1625.10(f)(1)(iii) are drafted in terms of the age 70 cap, it would appear that they should be modified slightly to the degree that they are dependent upon the age 70 cap. However, the concepts embodied in these safe harbors allowing age-related cost considerations must be preserved if employers are expected to continue offering disability benefits.

Prior to the ADEA amendments raising, and finally removing, the maximum age for coverage, employers could predict with some degree of specificity the extent of their liability under a disability benefit plan. Disability plans are a non-mandatory benefit which provide income protection to employees who are unable to work due to some infirmity. Thus, disability plans were developed to cover the normal working life of the employee, which could be determined with some accuracy. Many of these plans were drafted with the understanding that when a totally disabled employee reached normal retirement age, disability payments would cease in favor of pension benefits.

The I.B. apparently recognizes these considerations, since it provides safe harbors as follows:

> [t]he Department [of Labor] would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:
>
> > (A) With respect to disabilities which occur at age 60 or less, benefits cease at age 65.
> >
> > (B) with respect to disabilities which occur after age 60, benefits cease 5 years after disablement or at age 70, whichever occurs first. Cost data may be produced to support other patterns of reduction as well.

29 C.F.R. § 1625.10(f)(1)(iii). The I.B. also authorizes reductions in the level of benefits when justifiable on the basis of age-related cost considerations. Id.

For the reasons set forth above, it is imperative that these cost considerations be preserved. The alternative would be a requirement that disability benefits continue unreduced for the life of the employee, a result that would threaten the continuation of most disability plans.

Therefore, EEAC supports the position taken by the EEOC in Policy Statement No. N-915 (11/10/87) on long-term disability plans in so far as it endorses the continuing validity of the "equal cost" concept with regard to disability plans, stating:

> Thus, a reduction in benefits for older workers that is due to age-related cost factors still may be accomplished by reducing either the amount of the benefit or the duration of the benefit (or by an appropriate combination of both).

Policy Statement at p. 4. Thus, the Policy Statement continues the "safe harbors" embodied in the I.B. with the necessary removal of the age 70 limitation. However, with the lifting of the age-70 cap, disability costs can be expected to increase and no set period of required disability payments should be established by the Commission.

3b. Is there adequate data to develop more precise safe harbors?

As stated in 3a, EEAC urges continuation of existing safe harbors. If any more specific safe harbors are developed as part of this regulatory effort, EEAC cautions that they should be clearly identified as examples which are not exclusive and do not invalidate any plans justifiable by age-related cost considerations.

3c. What is the employer's obligation to older workers (e.g. those over 80) if long-term disability insurance is not commercially available?

See response to 2c. above.

3d. Must long term disability benefits and retirement benefits be paid at the same time?

The ADEA certainly does not require simultaneous payment of disability benefits and retirement benefits. EEAC therefore cautions that regulation in this area would not be supported by the statute.

The purposes of disability benefits and retirement benefits are mutually exclusive. Disability benefits are provided as income replacement for employees who are physically unable to work; retirement benefits are compensation for long service and are paid to employees who reach normal retirement age and choose not to work any longer. Under most retirement plans, no benefits are payable until an employee elects to retire and files an application to receive a benefit, at least until the employee reaches age 70-1/2. 1/ Just as an employee ceases to draw a salary when he chooses to retire, so also may a disability benefit plan cease payment when the employee elects to receive a retirement benefit or when retirement benefit payments are required to begin pursuant to § 401(a)(14) of the Internal Revenue Code.

This "gray area" could arise under the disability "safe harbors" of the I.B. If, for example, an employee becomes totally disabled at age 64, he would be eligible for disability benefits under the I.B. for a period of five years. In the interim, assuming that normal retirement age in the applicable pension plan is 65, he could also become eligible for retirement benefits. In this situation, it is neither inappropriate nor unfair to expect that employee to choose between disability and retirement benefits. Either he remains constructively in the work force, receiving disability benefits, or he voluntarily removes himself from the employer's work force, as does any other retiree, and receives a pension. In either circumstance, no benefit is being denied him because of his age, and thus the ADEA is not violated.

4. Health Insurance

4a. In light of the passage of section 4(g), should health insurance plans be permitted to reduce the benefits of (or increase the costs for) employees under the age of 65?

Section 4(g) provides:

> (1) For purposes of this section, any employer must provide that any employee aged 65 or older and any employee's spouse aged 65 or older shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.
>
> (2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in

---

1/ Section 11219(b) of the Tax Reform Act of 1986, P.L. 99-514, amended § 401(a)(9) of the Internal Revenue Code to require distributions from qualified retirement plans beginning in the calendar year in which the employee reaches age 70-1/2. This factor does not alter the above analysis. Since disability benefits are intended to provide income for those who cannot work, the existence of a retirement income obviates the need for a disability benefit.

> section 162(i)(2) of [the Internal Revenue Code of 1954].

29 U.S.C. § 623(g).

The EEOC has already approved an increase in costs for employees under 65 in light of § 4(g). In Policy Statement N-915-026 (5/12/88), in explaining that employees over 65 cannot be required to contribute at a higher level than younger employees, the EEOC stated:

> Contribution levels for all plan participants may be increased to reflect the increased costs of health insurance resulting from section 4(g), but such increases must be distributed equally to all plan participants and may not exceed the employee's proportionate share as that share has previously existed.

Policy Statement at 7 - 8. Absent contractual obligations, employers should also be permitted to reduce the level of health insurance benefits provided to all employees if the cost of maintaining the existing level of benefits for employees over 65 becomes prohibitive.

5. Severance pay and sick pay plans.

5a. Should severance pay and/or sick pay plans be considered "employee benefit plans" under section 4(f)(2)? If so, under what circumstances?

Severance pay and sick pay plans are generally age-neutral, so that payment of benefits under these plans would not violate the ADEA. However, if a plaintiff makes out a prima facie case with regard to a severance pay or sick pay plan, employers should have, as they have always had, the opportunity to raise § 4(f)(2) in their defense if appropriate.

Severance pay and sick pay plans clearly meet the definition of "employee benefit plan" set forth in the 1979 I.B., which states:

> An "employee benefit plan" is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as "fringe benefits."

29 C.F.R. 1625.10(b). Thus, being "fringe benefits," sick pay and severance pay meet the threshold qualification of "employee benefit plan" of § 4(f)(2).

Because of the wide diversity in severance and sick pay plans, this area is not conducive to development of a blanket rule. For example, some employers have obligated themselves to make severance payments as part of ongoing collective bargaining agreements. Others may pay severance pay on a one-time basis due to a plant closing. Although the former situation is more likely than the latter to be considered by employers and employees alike as part of a benefit "plan," the employer in the latter situation should not be foreclosed by regulation from raising the §4(f)(2) defense. Rather, it should be left to the courts to determine, on a case-by-case basis, whether the facts support consideration of a particular benefit as an "employee benefit plan" under § 4(f)(2). In each situation, the employer should have the opportunity to put forth the defense offered in § 4(f)(2) that its actions were taken in accord with a bona fide employee benefit plan for legitimate, nondiscriminatory reasons.

5b. How could such plans show lack of subterfuge?

As stated above in response to question 1b., EEAC believes that the McDonnell Douglas/Burdine test should be applied to § 4(f)(2) cases, so that the burden of demonstrating the existence of subterfuge should be placed on the plaintiff. Otherwise, "subterfuge" becomes a nebulous issue which in effect forces the employer to "prove" a negative, the "absence of discriminatory motive," which the Supreme Court declined to do in Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978)(per curiam).

Thus, to support such plans, employers should not be required to show "lack of subterfuge" as an element of proof. On the contrary, as stated above, after a prima facie case has been established, the employer's burden is to articulate a legitimate nondiscriminatory reason for its plan. One way of doing so would be to produce evidence that the terms of a plan providing lesser benefits to older employees are justified by age-related cost factors as described in § (d)(1) of the I.B. If, for example, the employer can show that, under the terms of the plan, it would be more costly to provide the same benefit to older workers than to younger workers, then, with adequate evidence, the "equal cost" principle will justify a lower benefit.

5c. Under what circumstances, if any, could such plans be included in a benefit package with other section 4(f)(2) benefits?

Severance pay and sick pay plans, being "bona fide employee benefit plans" under the I.B. definition, should therefore be includable in a benefit package with other § 4(f)(2) benefits. The concept of the "benefit package approach," as set forth in § (f)(2) of the I.B., is that deviations from a benefit-by-benefit approach are permitted as long as the overall result is equal. Thus, a shortfall in one benefit can be offset by an increase in some other benefit. I.B. § (f)(2)(iv).

The "benefit package approach" allows for great flexibility in structuring an employee benefit package under § 4(f)(2). There is no reason to exclude severance pay or sick pay plans from this analysis; in fact, there is every reason to include them. Both severance pay and sick pay are non-mandatory benefits, although some employers may choose to obligate themselves voluntarily or through collective bargaining agreements. Both require payment from the employer to the employee in excess of earned wages or salary.

If an employer, for cost reasons, reduces the amount of some other benefit on account of age and chooses instead to increase the amount of severance pay or sick pay available to older workers, the "equal benefit" principle is thus satisfied, as are the purposes of the ADEA. There is no justification for ignoring the fact that severance pay or sick pay are part of the "benefit package" provided to employees. Instead, these benefits, in the view of both employer and employee, may counterbalance an age-based reduction in some other benefit.

Conclusion

For the reasons stated, EEAC urges the Commission not to amend the I.B. except as required by recent Congressional amendments to the ADEA. In those instances where changes to the I.B. are necessary to conform its provisions to the ADEA, the revisions should conform as closely as possible to the policies underlying the existing I.B.

Thank you for affording us the opportunity to submit these comments.

Very truly yours,

Jeffrey A. Norris

Jeffrey A. Norris
President

cc: Clarence Thomas, Chairman
Pamela Talkin, Chief of Staff
R. Gaull Silberman, Vice Chairman
Joy Cherian, Commissioner
Toney E. Gallegos, Commissioner
Evan J. Kemp, Jr., Commissioner
Charles A. Shanor, General Counsel
Deborah J. Graham, Director, Office of Communications and Legislative Affairs
Richard D. Komer, Legal Counsel
Joseph W. Cleary, ADEA Div. Assistant Legal Counsel
Paul Boymel, General Attorney
Paul Brenner, General Attorney

Senator **Jeffords**. Mr. Chairman, I would like to defer my questions to the period after the hearing here. I have another appointment right now.

I would just say I appreciate very much your testimony and we will have questions for you. There is a 2-week period or so for response.

Mr. **McDowell**. I intend to do that.

Senator **Jeffords**. All right. Fine.

Thank you very much, Mr. Chairman.

Senator **Metzenbaum**. I want to thank Senator Jeffords. You have been very cooperative as you always are in sitting through this entire hearing, and thank you very much. We will conclude, as a matter of fact, rather rapidly ourselves.

As a matter of fact, at this point I might say that we have received letters or written statements from several organizations concerning the pending legislation. At this point I wish to have those letters and statements included as part of the hearing record.

[The letters and statements follow:]

P O BOX 305
MARTINSVILLE, VA 24112

International Brotherhood of Du Pont Workers

September 27, 1989

The Honorable David Pryor
Chairman, Special Committee on Aging
United States Senate
Washington, D.C. 20510

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
United States Senate
Washington, D.C. 20510

The Honorable James Jeffords
Subcommittee on Labor
United States Senate
Washington, D.C. 20510

Dear Chairman Pryor, Metzenbaum and Jeffords:

This letter is being submitted by the International Brotherhood of DuPont Workers (I.B.D.W.) in connection with the joint hearing conducted on September 21, 1989 by the Select Committee on Aging and the Subcommittees on Labor-Management Relations and Employment Opportunities of the committee on Education and Labor on the subject of "Employee Benefit Plans: The Impact on the *Betts* Decision". We ask that this letter be made part of the hearing record.

The I.B.D.W. represents approximately 10,000 employees participating in nine locals throughout the country.

The I.B.D.W. believes that the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S. Ct. 2854 (1989) improperly limited the applicability of the Age Discrimination in Employment Act ("ADEA") to employee benefit plans. Regulations in effect since 1969 properly interpreted the ADEA to permit age-based reductions in employee benefits only where justified by age-related costs. This regulation was consistent with the ADEA's legislative history in both 1967 and 1978.

Unless corrective legislation is passed promptly, employers may be tempted to target older workers for benefit reductions based solely on their age. Unions may now be forced to make valuable concessions to receive benefits for older workers that the ADEA previously required.

In addition, the Betts decision endangers meritorious litigation which more than 200 Dupont employees and retirees have pursued under the ADEA in challenging an age discriminatory early retirement incentive program which DuPont provided in 1985. These employees and retirees were unlawfully denied benefits under that program based on their age. In this regard, while DuPont voluntarily increased the pensions of many younger employees by 100-150%, many of DuPont's oldest and most senior employees received no benefits whatsoever from the program.

We support the retroactivity provisions in the S. 1511 as these provisions ensure that victims of practices such as those engaged in by DuPont can continue to pursue those claims. For all these reasons, the I.B.D.W. supports the prompt passage of S. 1511 (H.R. 3200).

Should you have any questions or concerns regarding this matter, please feel free to contact me at the following address and phone number:

Two Bala Plaza, Suite 300
Bala Cynwyd, PA 19004

215-668-1140

Sincerely,

Kenneth Henley
General Counsel

cc: H. Dean Goad, President
International Brotherhood of DuPont Workers

KH:ams

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO
277 EAST TOWN STREET COLUMBUS, OHIO 43215

TELEPHONE (614) 466-2085

September 21, 1989

When replying please give your Social Security number. This is now used to identify your account in PERS

The Honorable David H. Pryor
Senate Office Building
Washington, DC 20510

Dear Senator Pryor:

We urge you and the other members of the Senate Special Committee on Aging to consider the adverse implications of S. 1511 on public pension plans. This bill is a legislative remedy to the U.S. Supreme Court's decision in Public Employees Retirement System v. Betts.

The Betts case involved Ohio statutes governing public retirement plans. As such, we believe we have a particular insight in this matter. In Mrs. Betts' particular circumstances PERS is providing a monthly benefit, cost of living adjustments and health care coverage for her based on approximately seven years of public service. She receives these benefits pursuant to an integrated statutory benefit plan. These benefits are paid to her irrespective of any source of income.

While we can understand concerns that the Court decision may permit employers to use pension plans to establish improper age discrimination in employment, these concerns are misplaced for public plans.

Public plans are established and governed by statutes. Changes in these statutes must be done through action by the legislature and governor. Our legislative process does not permit gratuitous, irrelevant or discriminatory motives concerning the design of plan benefits. Actuarial soundness of the plan is most important in order to provide those retirement and other benefits promised to public employees and their survivors. There are approximately 700,000 public employees in Ohio covered by the state funds and 225,000 retirees and beneficiaries receiving benefits.

The majority of public plans provide both disability and service retirement benefits to employees. Disability benefits were designed to protect employees who but for their disability would be career public employees. Age and service benefits provide for the actual career employee. As noted by one amici brief in the Betts case, 35 states either restrict disability retirement benefits to those disabled prior to age and service retirement age or have age-related distinctions in establishing eligibility. In Ohio the restrictions have been part of the overall plan design for decades. To precipitately enact retroactive legislation such as contemplated in your bill would play havoc with plan benefits and funding. Not only would the plans be subject to uncertain past liability but also uncertainly as to how and when the plans could be legislatively redesigned.

WILLIAM S. McLAUGHLIN
Executive Director

RICHARD D. MYERS
Assistant Director — Benefits

ROBERT A. McLAUGHLIN
Assistant Director — Investment Officer

RICHARD E. SCHUMACHER
Assistant Director — Comptroller

EDWARD T. HALE
Manager — Data Information Systems

Further, such action would potentially harm the very employees intended to be helped. In the Ohio public plans disability retirement benefits are available to employees who are not able to work and have not reached age and service retirement age. If an employee has reached age and service retirement age, he/she is ineligible for disability retirement benefits but may receive age and service benefits. The service credit requirement for each type of benefit is the same. Thus, an employee (otherwise eligible) with at least five years of service credit if under age 60 may qualify for disability benefits but if over age 60 would qualify for age and service benefits. As actuarially funded systems, if age distinctions were prohibited, we may have serious problems maintaining the currently designed plan structure.

In summary, we urge you to not act retroactively in attempting to overrule the Betts decision, or if you do, to consider a distinction for public plans in constructing a legislative response to the Betts decision.

Yours very truly,

William S. McLaughlin
WILLIAM S. MCLAUGHLIN
Executive Director

WSM/cle
Enc.

cc: All committee members

UAW
INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA—UAW
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September 21, 1989

The Honorable Howard Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources
U. S. Senate
Washington, D. C. 20510

The Honorable David Pryor
Chairman, Special Committee on Aging
U. S. Senate
Washington, D. C. 20510

Dear Chairmen Metzenbaum and Pryor:

This letter is being submitted by the UAW in connection with the joint hearing being conducted on September 27, 1989 by the Special Committee on Aging and the Subcommittee on Labor of the Committee on Labor and Human Resources on the subject of the proposed "Older Workers Benefit Protection Act" (S. 1511). We ask that this letter be made part of the hearing record.

The UAW believes that the Supreme Court's recent decision in Public Employees Retirement System of Ohio v. Betts goes much too far and should be overturned. In effect, this decision would immunize virtually all employee benefit plans from age discrimination challenges. We do not believe that this was the intent of Congress when it enacted the Age Discrimination In Employment Act.

Although the UAW sympathizes with the intent behind the proposed "Older Workers Benefit Protection Act" (S. 1511), which has been introduced to overturn the Betts decision, unfortunately we cannot support this legislation in its present form. The UAW urges the sponsors to consider a number of modifications to the bill.

First, some persons have raised questions as to whether S. 1511 would make unlawful all types of subsidized early retirement programs. The UAW has negotiated subsidized early retirement programs throughout the automobile, aerospace, and agricultural implement industries. Many other unions have neogitated similar programs in other industries. These programs have enabled thousands of workers to enjoy a decent standard of living during their retirement years. In addition, in industries which are experiencing a contraction in their workforce, subsidized early retirement programs provide an alternative to mass layoffs of younger workers. We do not believe that the sponsors of S. 1511 intend to make unlawful subsidized early retirement programs. The UAW therefore urges that language be added to the legislation making it clear that these programs are perfectly lawful under the ADEA.

Second, we are also concerned that S. 1511 would prohibit the integration of employee benefit plans, such as severance or supplemental unemployment benefit plans and pension plans. The UAW has negotiated integrated benefit programs with many companies. We believe that this type of approach represents the best method of assuring the continuation of income and health care throughout the lifetime of workers and their families. If these integrated benefit programs are made unlawful, this will simply permit a small group of workers to "double dip" at the expense of all workers and retirees. Accordingly, we believe that S. 1511 should be amended to expressly permit integrated benefit programs.

Third, the UAW is concerned about the question of retroactivity under S. 1511. Although we believe that Betts was incorrectly decided and should be overturned, the fact is that the law relating to age discrimination in employee benefit plans was unsettled in a number of areas prior to that decision. Thus, we believe it would not be appropriate to permit individuals to bring lawsuits in these areas based on claims which arose prior to the Betts decision or the enactment of any legislation designed to overturn the Betts decision.

In conclusion, the UAW commends you, Mr. Chairmen, for holding hearings on the issues raised by the Betts decision. We look forward to working with you and the other Members of your Committees in crafting legislation which will remedy the problems created by the Betts decision, without disrupting socially desirable practices under employee benefit plans.

Your consideration of our views on this important issue will be appreciated. Thank you.

Sincerely,

Dick Warden

Dick Warden
Legislative Director

DW:njk
opeiu494

Reg [illegible]

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SENATOR JEFFORDS
SEP 20 AM 9
WASHINGTON OFFICE

September 18, 1989

The Hon. James M. Jeffords
United States Senate
530 Dirksen Senate Office Building
Washington, D.C. 20510

Re: S.1511 - Age Discrimination in Employment

Dear Senator Jeffords:

I am writing to you as a sponsor of S.1511 at the request of my client, Hugh Bell Muller. Mr. Muller is a firm supporter of the legislation you are sponsoring. But S.1511 does not reach far enough since it does not specifically apply to federal employees.

As a sponsor of S.1511 you are no doubt aware that federal courts have consistently held that the denial of severance pay benefits to pension-eligible involuntary retirees in the private sector was prohibited by the Age Discrimination in Employment Act (ADEA, 29 USC 621 et seq). 1/

On June 23, 1989, the Supreme Court decided Public Employees Retirement System of Ohio v Betts, 109 S.Ct. 2854, 57 LW 4931 (1989). The Betts decision changed the common understanding of ADEA based challenges in benefits discrimination cases. The Court held that § 4(f)(2) of the ADEA, which exempts from the Act's

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1/ See EEOC v Westinghouse Elec. Corp., 725 F2d 211 (3rd Cir. 1983), cert denied, 469 US 820 (1984), on remand, 632 F Supp 343 (ED Pa. 1986); aff'd in part 869 F2d 696 (3rd Cir. 1989); EEOC v Great Atlantic & Pac. Tea Co., 618 F Supp 115 (ND Ohio 1985); EEOC v Borden's Inc., 551 F Supp 1095 (D. Ariz 1982); EEOC v Babcock & Wilcox Co, 42 Empl Prac Dec (CCH) 36,904 at 42, 360, 43 Fair Empl. Prac. Cas. (BNA) 666 (D.N.J. 1982); Malone v Borden, Inc., 6 Empl Benefit Cas. (BNA) 1341.

prohibitions certain actions taken in observance of "the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act]," exempts all bona fide employee benefit plans (e.g. severance pay plans) from the purview of the ADEA unless the plan is a subterfuge for discrimination in the nonfringe-benefit aspects of the employment relationship. As noted by Justice Marshall in dissent, this holding "casts aside the estimable wisdom of all five Courts of Appeal to consider the ADEA's applicability to benefit programs . . ." 109 S Ct ______.

Your sponsorship of S.1511 may provide the necessary corrective by amending the ADEA to require "equal benefit or equal cost" fringe benefits regardless of age and applying this change to litigation pending on the date of the Betts decision. However, these changes will not specifically apply to one large group of employees to whom Congress has a special obligation -- federal employees.

Two years ago, Mr. Muller was employed as a Park Ranger by the National Park Service (NPS). He was 56 years of age. He had approximately 31 years of government service and had occupied increasingly responsible positions in a variety of locations (Virgin Islands, Florida Everglades, Yosemite, Blue Ridge Mountains, Washington, D.C.). In 1987 he was the Director of International Park Seminars. This was a program operated by the NPS pursuant to agreements with the School of Natural Resources, University of Michigan and Parks Canada.

As a result of Gramm Rudman Hollings Act personnel ceilings and budget reductions, the NPS unilaterally terminated the seminar program effective December 16, 1987. By letter of December 3, 1987 Mr. Muller was advised that his position was being eliminated and there were no other positions as to which he had assignment rights. (As the only NPS employee at his level within commuting distance of Ann Arbor, Michigan, he had no right to "bump" a less senior employee and no rights to transfer to a new geographical location.)

Mr. Muller was involuntarily separated from his employment on February 13, 1988. There is not the slightest implication that his job performance influenced this decision. He has consistently received favorable job evaluations.

As a federal employee whose age and years of service entitled him to a pension he began to receive a retirement annuity. This annuity amounts to approximately one-half of his former salary and is significantly less than he would have received had he continued to work until voluntary retirement at age 65 as he had planned. Furthermore, because he was eligible for an immediate federal retirement annuity he was denied severance pay! Severance pay would have been available under the provisions of the Federal Employees Salary Act (5 USC § 5595) except for the fact that he was eligible for retirement benefits.

In other words the NPS, in reliance on 5 USC § 5595(a)(2)(iv) denied substantial severance pay benefits to Mr. Muller because he was old enough to receive a retirement annuity. This is the very kind of discrimination the ADEA was, until Betts, interpreted to prohibit. Your bill will restore the ADEA to its pre-Betts condition, but how will that affect federal employees? The answer is unclear. No appellate court has expressly ruled on whether the federal amendments to the ADEA implicitly repealed the age discriminatory eligibility provisions of the Federal Employees Salary Act. S.1511 does not clarify Congress' intent on this issue.

Mr. Muller has pursued his administrative remedies through the Merit System Protection Board and the EEOC. In both fora the final ruling was that denial of severance pay benefits because of pension eligibility was permitted pursuant to the Federal Employees Salary Act. The irony (hypocrisy) of the EEOC's position on this issue should not be lost. The EEOC has litigated many of the successful private sector cases in which the courts have ruled that severance pay may not be denied for reasons of pension eligibility.

It is irrational for federal law to deny severance pay because of eligibility for a retirement annuity. The retirement annuity is earned by dint of long service to the government. It is paid to eligible employees who voluntarily retire or who are involuntarily separated from employment. It is intended to provide a stream of income for the rest of the retiree's natural life. Severance pay, on the other hand, is temporary. It is paid over a short period of time following involuntary separation from employment. Eligibility under the Federal Employees Salary Act may exist with as little as 12 months of employment. Severance pay is the anesthesia for the trauma suffered by the loss of a job. It is paid even where the separatee gains immediate non-federal employment and thereby suffers no interruption or diminution of income. It is irrational to deny severance pay to an older, pension eligible, involuntary separatee. The older involuntary separatee is subject to the same disruption and trauma faced by the younger and must shoulder the additional burden of facing age discrimination in the employment re-entry market. Mr. Muller's situation puts flesh on these considerations.

Mr. Muller does not regret the decision he made some 30 years ago to go into government service. He chose federal service because he believes in public service and in the philosophy and purpose of the NPS. He knew the career would not offer opportunities for acquiring great wealth. He knew what the retirement benefits would be. However, he believed he would have a degree of job security and protection from irrational discrimination.

Mr. Muller, as a pension-eligible relatively highly paid employee in a one-person competitive area, offered an excellent target of opportunity for the NPS to accomplish a reduction-in-force. Regardless of the motive of the NPS, the effect was that Mr. Muller's employment could be terminated with no further cost to the NPS. His pension is not paid from an NPS budget. He had no "bumping rights" so the decision to terminate Mr. Muller would cause no disruption of any other NPS staffing. And, most fortuitously for NPS, severance pay benefits which would have been forthcoming from NPS funds for a younger involuntary-separatee, would not have to be paid to Mr. Muller.

Mr. Muller is a victim of these circumstances. Age discrimination in the denial of severance pay has victimized him in ways your sponsorship of S.1511 is designed to correct in the private sector. Mr. Muller has sued the NPS raising constitutional and ADEA claims with respect to the denial of severance pay. He has been met with a motion for summary judgment which says, in effect, the NPS admits that in pre-Betts law, it could not have denied severance pay if it was a private employer. But as a federal employer, the NPS argues, it is free to deny severance pay to pension-eligible involuntary separatees based on the Federal Employees Salary Act (5 USC 5595(a)(s)(iv)). The NPS says that the federal amendments to the ADEA did not implicitly repeal the age discriminatory provisions of the Federal Employees Salary Act. The NPS does not believe what Senator Bentson said in 1974, "The passage of this measure [federal amendments to the ADEA] insures that government employees will be subject to the same protections against arbitrary employment based on age as are employees in the private sector."

The court has not yet ruled on the issues raised by the NPS Motion for Summary Judgment. In the meantime S.1511 offers an opportunity with minor change for Congress to emphatically state that "equal benefit or equal cost" is the standard in employee benefits regardless of age in both private and federal employment. Federal employees (Mr. Muller is the example) deserve such protections no less than private employees. This can probably be accomplished by a simple statutory amendment striking 5 USC § 5595(a)(2)(iv) and making the change retroactive to the date of the Betts decision.

Thank you for your consideration of this lengthy letter.

Yours very truly,

MILLER, CANFIELD, PADDOCK AND STONE

By Charles A. Duerr
Charles A. Duerr, Jr.

CADJr maj

cc Christopher G. Mackaronis
Manager, Advocacy Programs
Worker Equity Department of
American Association of
Retired Persons
1909 K Street, N.W.
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Hugh B. Muller

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PREPARED STATEMENT OF THE WOMEN'S EQUITY ACTION LEAGUE

Women's Equity Action League (WEAL) specializes in issues of economic equity for women. WEAL has testified before committees of both Houses of Congress on many occasions, particularly on matters within its special expertise--pensions, insurance, equal opportunity in education and employment, and women in the military.

As a group, older women have yet to achieve their share of economic equity. Disadvantaged for many years by being denied access to many of the more lucrative jobs, their lines of promotion prematurely blocked by the existence of prejudices regarding women as bosses, paid less for doing the same work as men and often doing it better, women were further hampered by inadequate pensions. Because unduly long qualifying and vesting periods were unsuited to employment patterns of many women, they often found themselves without any pension at all. Even when they were able to jump through all of the necessary hurdles to qualify to receive pensions, the fact that their salaries had always been low meant that their pensions were frequently mere pittances.

Until fairly recently, when the United States Supreme Court in Arizona Governing Committee v. Norris determined that paying lower benefits to women constituted a violation of Title VII of the Civil Rights Act of 1964, women were further disadvantaged by receiving lower monthly benefits even when they had the same salary and longevity history as their male colleagues. As a result of Norris, one of the most pernicious practices--

discrimination in fringe benefits on the basis of gender--became unlawful and elderly women, as least prospectively, would not see their small pensions reduced even further because of their gender.

However, a subsequent court decision has again jeopardized the economic security of older women. In Public Employees Retirement System of Ohio v. Betts, the Supreme Court, reversing the intent of the Age Discrimination in Employment Act, interpretative regulations and many lower court decisions, held that employers are free to discriminate on the basis of age in fringe benefit plans. This freedom to discriminate is virtually unlimited, extending to everything except contributions to pension plans. Even though pension plans would thus appear to be protected, in fact it is the retirement security of older women that is most seriously threatened.

In the case before the Court, Ms. Betts became disabled at age 61. Had it not been for her disability she would have been able to work for a number of years to build up her age-and-service based credits in the Ohio Public Employee Retirement System (PERS). Recognizing that those who are disabled are denied the opportunity to establish credits for an adequate retirement, PERS provided for disability payments. However, in a case of pure discrimination based on age it denied that alternative to workers over age 60. Whereas this could make for a substantial financial hardship for any employee over 60, it is especially difficult for those women who, because of career interruptions for family responsibilities, have not by age 60 had a chance to build up enough service to provide themselves with an adequate pension benefit. These women had counted on additional years working to accumulate a pension sufficient to live on in their retirement years. Ms. Betts disability meant a reduction of nearly $200 per month in the amount on which she will have to live for the rest of her life. A similarly situated fellow worker just two years younger would not have faced this substantial financial problem; it would seem that this is exactly the sort of discrimination that the ADEA sought to prohibit.

Although certainly the effect on those precluded from disability plans can be Draconian, that it not the end of the discriminatory results of Betts. Established case law and regulations had made clear that discrimination in fringe benefits could be justified only by cost differentials. Now no such limitation applies and employers are free to discriminate at will in fringe benefits, which have become an ever more important part of compensation.

In a recent sex discrimination case I saw an employer who supplied subcompact cars to women sales representatives and full-size cars to their male colleagues, even though they all had to transport the same amount of merchandise. Whereas that discriminatory practice was halted as part of the settlement of the case, should the company choose to provide larger cars only to younger employers, there is nothing to prevent them. The same is true for other benefits. As a college professor I am very aware of the value of tuition benefit plans for employees and dependents. Now there is nothing to prevent these plans from being limited to employees under 60 or under 40.

Some employers provide free or subsidized meals; others at least provide on-site dining facilities. What if a company decided that to preserve its alleged image of youthful vigor (or just to save money) it would exclude older employees from such fringe benefits?

What if employers excluded older employees entirely from health plans? Costs of individual policies are exorbitant for everyone, but for women they are prohibitive. Gender discrimination in rates charged for individual plans is still legal in all but three states so not only has the Court sanctioned age discrimination, but they have sanctioned this invidious form of sex discrimination as well. "Invidious" is an appropriate characterization because although claims experience for younger women might financially (if not as a matter of social policy) justify higher premiums, women over fifty cost health insurers less in claims than do men but are still charged more than are men.

The same is true of private disability plans; generally costs are more for women without any statistical justification. Unless the effect of Betts is reversed, employers could exclude older workers entirely from a disability insurance plan, forcing them into the private insurance market. Disastrous as this would be for all older workers, it would be particularly hard on women.

Earning as they do only 2/3's of what men earn, women would be forced to pay an even larger portion of their own earnings for this crucial coverage.

Aside from pension plans themselves, there is no limit on the discrimination in fringe benefits permitted by Betts. In fact, workers over 40 or 50 or 60 could be excluded from all fringe benefits.

Under the Older Workers' Benefit Protection Act (S.1511/ H.R. 3200), the situation would return to what it was before Betts. Employers would be allowed to discriminate in the provision of benefits only to the extent that such discrimination could be justified by cost. For example, if a $10 a month contribution buys more life insurance for a younger worker than for a older worker making the same contribution would satisfy the requirements of the bill. However, the employer could not choose simply to provide no contribution for life insurance for the older worker as Betts would now allow.

Contrary to the fears of some employers and employees, the Older Workers' Benefit Protection Act would not jeopardize defined benefit retirement plans. Before gender discrimination was eliminated, employers and insurers predicted all sorts of computational complexities for all sorts of benefits, none of which have materialized. Actuaries are quite capable of producing the "equal cost" justification in the cases where it is a legitimate defense to differential treatment on the basis of age.

Neither are bona fide early retirement plans in any danger under the Older Workers' Benefit Protection Act. What will be prohibited are plans which deny severance benefits to older workers who are retiring while granting them to younger workers. Whereas it might seem at first glance that providing retiring workers with severance benefits is a form of double-payment, in fact it is not. Or rather it is the same form of double-payment which is granted to the younger employees. Younger employees who get severance payments do not have them deducted from their accumulated pension credits so that when they do eventually retire their benefits are reduced. Instead they receive the severance payments and the pension benefits to which their service with the company entitled them. The same should be true for older employees and in fact it will be under the Older Workers' Benefit Protection Act.

Because it opposes discrimination on the basis of age and particularly because it opposes such discrimination which has a disproportionately harsh impact on women, for the reasons detailed above Women's Equity Action League (WEAL) supports S. 1511/ H.R. 3200 and urges that it be passed expeditiously.

BELLSOUTH

R. B. Howard
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PREPARED STATEMENT OF THE BELLSOUTH CORPORATION

October 11, 1989

Mr. James J. Brudney
Majority Counsel for the Senate
Labor and Human Resources Committee
Subcommittee on Labor
SH-608 Hart Senate Office Building
Washington, D.C. 20510

Re: BellSouth Statement for the S. 1511 Hearing Record
September 27, 1989

Dear Mr. Brudney:

On behalf of BellSouth Corporation, this statement is submitted for the printed record of the September 27, 1989 hearing before the Senate Labor and Human Resources Committee, Subcommittee on Labor.

BellSouth Corporation employs approximately 100,000 people, 64,000 of whom are in bargaining units represented by the Communications Workers of America with which BellSouth bargains over issues such as employee benefit plans. While our primary business is providing telecommunications services to over 15 million customers in North Carolina, South Carolina, Georgia, Florida, Alabama, Tennessee, Kentucky, Louisiana, and Mississippi, the various BellSouth Companies offer products and services in 47 states and 8 countries throughout the world. Among our subsidiaries are Southern Bell, South Central Bell, BellSouth Services, and BellSouth Enterprises.

BellSouth believes that passage of S. 1511, would invalidate virtually hundreds of currently accepted benefit arrangements and practices in effect in this country.

OLDER WORKERS COULD BE HARMED

The legislation could, as currently drafted, adversely affect the interests of those employees whom ADEA is designed to protect -- older workers. The proposed legislation could cause employers to eliminate or reduce the levels of benefit plans such as early retirement subsidies, voluntary early retirement programs, and other programs which benefit older employees. Moreover, this legislation would discourage companies which do not offer a broad range of benefit plans from doing so.

S. 1511 COULD ELIMINATE COORDINATED BENEFIT PACKAGES

An employer strives to design a benefit package which accommodates the needs of its particular employee body. All employers have limited resources available for such a package. Therefore, an attempt is made to coordinate and integrate benefit plans so that funds are allocated in a manner which serves the needs of all parties involved. Coordination allows a company to spread benefit coverage equitably throughout the organization to meet its goals of attracting and retaining qualified employees. A well-designed package takes into consideration those benefits which employees would receive based on age, years of experience, and other factors. A package is thus developed that would provide benefits to the largest number of employees possible and distribute the benefit dollars equitably throughout the organization.

Coordination of benefits such as pension/severance pay offsets insure that some employees do not receive the windfall of duplicate coverage while others receive a lesser amount. Because this legislation requires that, in order to use age based criteria, benefit payments for each older employee be greater than that paid to any younger employee, the amount of dollars could not be spread equitably among employees in different categories.

If it was even possible to calculate the cost to an employer of an individual's benefit, such a requirement would encourage employers to take steps that would adversely effect an employee. For example, most pension plans pay a higher pension to a 65 year old employee than to a 50 year old employee with the same amount of service. Because age is the only criteria for differentiation in that case, the legislation would require that the 50 and 65 year old employees receive the same pension if they have the same service. An employer would then be forced to either set the retirement criteria on service alone or alter the type of pension benefits offered. This result is certainly not consistent with the intent of the ADEA and would legislate against practices which are currently lawful under ERISA and the Internal Revenue Code.

One of the greatest crises in the country today is the problem of rising health care costs and the cost to employers of providing benefit coverage. S. 1511 will have one of two effects. It will either deepen the crisis by invalidating most benefit plans currently in existence, thereby requiring the designing of more expensive plans, or it will result in a drastic reduction over time in the level and variety of benefits offered to employees.

VOLUNTARY EARLY RETIREMENT PROGRAMS COULD BE ELIMINATED

An example of how this legislation would harm employees is in the area of voluntary early retirement programs. These programs have been successfully used by many employers, including BellSouth. Normally, existing pension benefits are enhanced for employees who may want to leave the payroll before attaining eligibility for a non-discounted pension or a supplement is paid to those eligible for a full pension. These programs accommodate employees who are either ready to retire or start a new career. The prohibition in S. 1511 against any age based distinction unless "for each benefit or benefit package...the actual amount of payment made on behalf of the older worker" is "no less than that made on behalf of a younger worker" will ring the death knell for such programs.

In an effort to allow eligible employees the opportunity to leave the payroll voluntarily, companies provide incentives such as lump-sum payments based on years of service, present value of current pension discount, or other criteria necessary to attract acceptance by the desired group. If a company had to pay actuarially equivalent amounts to all retirement eligible employees, the amount to be paid from the available funds would be insufficient to encourage younger employees to retire or the amount which would have to be paid by the company would be so excessive that the company could not afford to offer the program. Therefore, employers would merely bypass voluntary plans and could be forced to resort to involuntary layoffs.

PENSION/SEVERANCE OFFSET PLANS SHOULD BE ALLOWED

Another example of the negative impact of this legislation would be the elimination of an employer's right to implement pension/severance offset plans or severance plans which take into consideration the fact that some employees are eligible for a full pension and some are not. It is certainly equitable to allow an employer to calculate severance pay by taking into consideration the fact that one individual is eligible for a full pension and one is eligible only for a discounted pension. Severance pay is intended to provide transition payments for an employee going from one job to another.

The employee ineligible for full pension receives a smaller pension upon leaving the company and will need a larger severance payment. This proposed legislation would place an employer in a position of deciding to either pay the larger amount to both employees, which may result in the eventual elimination of the severance plan, or reducing the severance amount over time. In either case employees will suffer. Severance plans help mostly older employees ineligible for full retirement. If the same amount of severance dollars had to be offered to all retirement eligible employees, the amount would definitely go down.

THE BILL WOULD IMPEDE THE COLLECTIVE BARGAINING PROCESS

BellSouth has a history of an excellent bargaining relationship with CWA. We have successfully bargained a total benefit package which meets the needs of our employees. Our benefit plans are coordinated and integrated so that funds are allocated in a manner serving the needs of both the company and its employees. Legislative interference would not only impede the bargaining process, but would harm those whom it was intended to serve.

THE BILL WOULD PREVENT SOCIAL SECURITY INTEGRATION INTO BENEFIT PAYMENTS

I must point out that basic design of virtually all retirement plans utilizes age based distinctions. A typical plan establishes normal retirement age at which a worker becomes eligible to retire and receive full benefits. Most plans offer an early retirement option which would allow an employee to retire with a predetermined discount from the full pension. The discount is based upon a schedule or actuarial table according to the amount of time remaining until that employee would have reached normal retirement age.

Some plans establish certain levels of benefits with the understanding that employees whose ages qualify them for Social Security benefits would receive that government benefit which, when combined with the pension benefit, will provide a fair and appropriate retirement income. This is known as "Social Security Integration". The proposed legislation would make these types of age based distinctions unlawful and would expand the ADEA's definition of compensation to cover all employee benefits including retirement benefits. By prohibiting age distinctions in benefit planning, the use of any age based factors would be eliminated even though age is the major eligibility component of a vast number of retirement plans.

COST ANALYSIS REQUIREMENTS WOULD BE VIRTUALLY IMPOSSIBLE TO MEET

Calculating "equal cost-equal benefit" would be a costly task for all employers. Retirement plans utilize legitimate age distinctions, yet are seldom susceptible to precise cost analysis. A company may maintain a pension plan offering employees a set percentage of their final salary for each year of service when they retire at age 65. However, the plan is usually funded through employer contributions and the investment gains of the pension fund. The amount which the company must contribute each year is determined by the plan's actuaries.

In order to accurately predict a defined benefit plan's funding needs, the actuary must predict with some degree of assurance the age at which employees can be expected to retire and the benefits to which they will be entitled. Therefore, the non-discount age and Social Security benefits determine when the employees are economically eligible to retire. Because such plans are funded on actuarial predictions of the future rather than the cost of providing the benefit to one individual, the employer would not be able to show the cost of providing a benefit to any one employee. Therefore, the cost justification defense will be virtually impossible to raise. Accordingly, the company must abandon its early retirement option, increase its contributions, or require employees to contribute to offset the increased demand on its basic pension fund.

A substantial portion of each fund's income depends on the performance of various investment vehicles. It would be virtually impossible to identify that portion of the fund and its earnings directly traceable to employer contributions on behalf of a particular individual. Because the cost justification defense would be almost impossible to raise, the practical effect of this legislation would be the elimination of threshold ages for retirement eligibility, a requirement that younger protected employees receive the same benefits as older protected employees, and employer's inability to impose an early retirement discount on those retiring before normal retirement age. These results would be totally contrary to all traditional principles of benefit plan design. Moreover, if the legislation is retroactive, this could result in a 42 year old employee who meets the minimum vesting requirements for pension eligibility claiming that only his age prevents him from retiring with full benefits. He would contend that he should be entitled to retire with full benefits. The fund was designed to pay him a benefit beginning many years in the future and the impact on pension funds of companies throughout the country could be catastrophic.

Any cost analysis requirement should allow cost analysis in aggregate for the entire package of benefits. An employer should be protected from younger employees' claims that their benefits are illegal because of age distinction. To manage for the long term, we must have normal retirement age criteria from which we can discount for early retirement.

CONCLUSION

We feel that the Betts case addressed a very special set of circumstances of someone who was unfortunate to be the subject of a terrible disease. I must point out that under the current BellSouth benefit rules, Ms. Betts would have qualified for a deferred vested pension. She would have been eligible for 52 weeks of sickness benefits after which she would have qualified for long-term disability until eligible for a deferred vested pension at age 65. So while BellSouth would never be subjected to similar conditions, the proposed legislation would cause severe changes in our plans and would have a negative impact on our company and its employees. Also, the benefit needed for Ms. Betts is Long Term Care rather than increased pension. In fact, an increased pension may have prohibited her from being eligible for medicaid benefits.

BellSouth is firmly committed to complying with the spirit of all equal employment statutes including the Age Discrimination in Employment Act. Older workers are valuable assets and we firmly believe in protecting these workers. However, this legislation would not achieve this purpose. BellSouth urges the Committee to carefully study the issues presented by this legislation to assure that it represents sound employee benefit policy. We will also be glad to work with the members in your efforts to protect older workers.

Very truly yours,

Roy B. Howard

Roy B. Howard

RBH/bkt

American Iron and Steel Institute

1133 15TH STREET, N.W., WASHINGTON, D.C. 20005-2701

Peter A. Hernandez
Vice President
Employee Relations
(202) 452-7212

October 11, 1989

The Honorable Howard M. Metzenbaum, Chairman
Subcommittee on Labor of the Committee
on Labor and Human Resources
United States Senate
SR-140 Senate Russell Building
Washington, D.C. 20510-3502

RE: Statement on Behalf of both American Iron and Steel Institute and the National Association of Manufacturers on Older Workers Benefit Protection Act (S.1511) and Age Discrimination in Employment Act Amendments of 1989 (S.1293)

Dear Senator Metzenbaum:

American Iron and Steel Institute (AISI) is a not-for-profit trade association with forty three domestic member companies. AISI's members account for approximately 80% of raw steel production in the United States and employ a total of 170,000 people in steel-related operations. The National Association of Manufacturers is a business association of more than 13,500 member companies whose members range in size from very large to more than 9000 smaller manufacturing firms. The NAM member companies employ 85% of all workers in manufacturing and produce more than 80% of the nation's manufactured goods. We respectfully submit the attached statement describing our concerns with and objections to the referenced bills.

Briefly, we believe that the legislative proposals i) improperly characterize the U.S. Supreme Court decision in Public Employees Retirement System of Ohio v. Betts; ii) fail to recognize the significant adverse impact that the bill would have on existing integrated employee benefit plans offered by the domestic steel industry and many manufacturing companies; iii) make no provision for resolving the conflict created by this bill with a long history of carefully considered case law that has developed pursuant to the Employee Retirement Income Security Act; iv) would, through retroactive application, unfairly penalize employers that have had these benefit plans in effect for many years; and v) ultimately, disadvantage older workers who have long-service employment.

At a time when the steel industry and other manufacturers are struggling to modernize to meet fierce international competition, they can ill afford to be burdened by employment cost increases that hinder rather than help this restructuring effort. We urge the Committee to consider the pitfalls associated with these bills and not to seek a hasty legislative solution that would ultimately adversely affect more older workers than it would benefit.

If you have any questions regarding these comments, we would be pleased to meet with you or your staff.

Sincerely,

Peter A. Hernandez

PAH:mlt

Attach.

cc: Mr. James J. Brudney, Majority Chief Counsel-Senate Subcommittee on Labor
Mr. Randolph Hale (NAM)

PREPARED STATEMENT OF THE AMERICAN IRON AND STEEL INSTITUTE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS

This statement is submitted for the record on behalf of the American Iron and Steel Institute and the National Association of Manufacturers with respect to the Hearing held on September 27, 1989.

The American Iron and Steel Institute ("AISI") is a not-for-profit trade association with forty-three (43) domestic member companies with operations in 25 states. AISI's members account for approximately 80% of raw steel production in the United States, and employ a total of approximately 170,000 people in steel-related operations. Members range in size from the very large, employing more than 20,000 persons, to much smaller firms, employing several hundred workers.

The National Association of Manufacturers ("NAM") is a business association of more than 13,500 member companies and subsidiaries, large and small, located in every state. Members range in size from the very large to more than 9,000 smaller manufacturing firms, each with fewer than 500 employees. NAM member companies employ 85% of all workers in manufacturing and produce more than 80% of the nation's manufactured goods. NAM is affiliated with an additional 158,000 businesses through its Association Counsel and the National Industrial Counsel.

Presently pending before the Senate Labor and Human Resources Committee are S.1511 and S.1293 which their proponents contend will overturn the decision of the United States Supreme Court in Public Employees Retirement System of

Ohio v. Betts and restore the law to its pre-Betts state. Not only does this position improperly characterize the state of the law prior to the Betts decision, it totally ignores the significant adverse impact which either of these bills would have on existing employee benefit programs and makes no provision for the conflict between their provisions and the regulations and case law developed pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

S.1511 AND S.1293 Shift Normal Burdens of Proof In Discrimination Cases.

The Age Discrimination in Employment Act of 1969 ("ADEA") is an anti-discrimination statute, prohibiting unfavorable treatment of employees on the basis of their age. As other witnesses testified during the hearing, at the time of the ADEA's enactment, Congress made a specific decision to focus on providing employment opportunities for older workers and to leave the complex issue of benefit treatment to future legislation*, focusing instead on prohibiting unfavorable employment actions, such as failure to hire, promote, etc., based on age.

Since the enactment of the Civil Rights Act of 1964, the key in determining liability under the various discrimination laws has been the underlying motivation or intent for the complained of action. Case law developed in the past 25 years has made it clear that the burden of proof in demonstrating that intent, or improper motivation, lies with the person alleging improper conduct. Discriminatory intent, as to individuals such as June Betts, is presumed only when the employer is unable to offer a non-discriminatory reason or rational business purpose to explain the action taken. The pending bill would essentially overturn these firmly-rooted principles, presuming discriminatory intent from any age-related benefit criteria, which would be determined solely on an individual "results" standard and establishing a cost-justification test as the only legitimate basis for such result.

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*This commitment was met with the passage of ERISA in 1974.

What is Benefit Integration?

This shift in a basic tenet of discrimination law is especially troublesome given the nature of employee benefit packages generally. An employer's fringe benefit program is composed of multiple parts which, taken together, make up the package of benefits, over and above wages, which it offers to its employees. The differing parts of that program are frequently designed to meet special perceived needs of limited groups of employees, in order to permit the maximum number of employees to achieve the highest over-all level of benefits at a reasonable cost.

This approach, which underlies today's accepted principles for benefit program design, recognizes the wide range of employee demographics existing in the workforce of any major employer and the resulting differences in the needs and desires of the varying parts of that force.

Most benefit programs had their inception decades ago with relatively simple components. Over the years, additional pieces have been added to the frame-work, many designed solely to meet particularized needs which were not adequately addressed by other portions of the package. Because of this, the various pieces have a different impact on different groups of employees. However, the true determiner of the benefits furnished to any group of employees, whether older or younger, is the total benefit package which they receive over and above their salary or wage.

Fringe benefit packages are intended to provide for an employee and his or her family in times of adversity. One of their principal functions is to provide resources for income replacement or the payment of medical or other expenses, particularly during a time when normal wages are not available or are insufficient to meet these needs. In determining appropriate levels of such benefits, an employer normally takes into account monies available from other sources, particularly those which the employer, itself, is providing. Examples of such sources would be salary continuance programs, worker's compensation and long term disability programs, insured sickness and accident benefits, Social Security Disability payments, Medicare and Social Security Old age and Survivors benefits,. to name but a few.

This practice of interrelating the various elements of an employee fringe benefit package is frequently referred to as "integration" and simply exemplifies a design concept which seeks to cure a particular problem while taking into account other resources available to the employee group from other portions of the package. It is utilized in the benefit packages afforded by the members of AISI, by over 90% of the members of NAM and by most other employers.

How Benefit Integration Works

An example of integration can be found in the interaction of the Steel Industry's supplemental unemployment benefit plans ("SUB") with its pension plans.

Under the pension plans, an employee can usually continue to accrue age and service for a period of two years after termination of active employment. Under the SUB plans, an employee can accumulate up to 52 weeks of supplemental unemployment benefits to be utilized during a period of layoff.

An employee who is affected by a force reduction, who, at the time of his or her layoff, lacks sufficient age and service to be eligible for a pension may, during the following two year period, acquire sufficient additional age and service to become pension eligible. However, this places the employee in a situation where he or she is eligible for SUB only for the first year of layoff, but must remain on layoff for a second year in order to become eligible for the pension; thus, risking a year of layoff with no income in order to achieve pension eligibility.

In order to deal with this situation, the SUB plans were amended to provide that employees in this situation, and only those employees, would be eligible for additional benefits until they became pension eligible, or for up to an additional 52 weeks. This piece of the program was never intended to guarantee SUB to all employees for a two year period. It was intended solely to bridge an existing gap in the over-all program.

Similarly, many force reduction pensions provide for a supplementary payment, in addition to the normal pension amount, until the employee becomes eligible for Social Security benefits. Referred to as "Social Security bridge payments," and specifically recognized and approved under ERISA, these payments are designed to assist the employee, by means of an increased income stream, until the point in time that Social Security income becomes available.

Integration is not limited to a force reduction or shutdown context, but is the keystone upon which virtually all existing employee benefit packages are built. By prohibiting an integrated approach to the provision of fringe benefits, the proposed legislation would invalidate all such provisions, require most employers to redesign their entire fringe benefit package and effectively foreclose an employer's ability to provide a benefit package which addresses the needs of small groups of employees.

Existing Benefit Packages Favor Older Workers

An examination of existing employee benefit programs and the case law which has developed under ERISA, the statute under which they are controlled and monitored by both the Department of Labor and the Internal Revenue Service, makes clear that integration does not serve a nefarious purpose. To the contrary, fringe benefit packages, taken as a whole, favor longer-service employees. Additionally, integration itself, and many of the specific practices involved therein, have been specifically examined and approved under ERISA.

Indeed, the piecemeal approach to fringe benefit examination proposed by these bills, and the requirement of a cost-justification based on incremental age, not only ignore the favored treatment that older workers receive under such programs, but fail to acknowledge the impact that length of service has on benefit eligibility.

This impact can be seen by looking at the benefits available to persons with various age and service combinations under a normal steel industry shutdown program. For instance, an employee 59 years of age with 10 years of service would be eligible to receive severance allowance and a deferred vested pension payable at age 65; while an employee 59 years of age with 15 years of service would receive an immediate regular pension, plus a monthly supplement, plus a special payment equal to 13 weeks of salary, plus retiree life and health insurance and a death benefit payable for the life of his or her spouse equivalent to 1/2 of his or her pension.

As can readily be seen, the factor which changes the level of benefits for which these employees are eligible is not their age, but their length of service.

Contrary to the position taken by the EEOC, even the integration of severance allowance and pension plans in the event of a shutdown does not adversely effect older workers.

This is demonstrated by a review of the recent experience of a major steel company. The steel industry, like many other industries, has been engaged in over-all force reductions over the last several years. One affected company conducted a study, covering a three year period of heavy force reductions, looking specifically at the impact of the integration of its shutdown benefits on older employees. During this period of time, more than 15,000 employees were permanently laid off.

During the period studied, its pension plan provided that an employee who had more than ten years of service was eligible for a deferred vested pension payable at age 65, which could be taken on an actuarially reduced basis at any time after age 60; while an employee who had 30 years or more of service was entitled to an immediate, regular pension.

However, an employee who was affected by a shutdown, or who was laid off for a period in excess of two years (the period of time after which he or she ceased accruing service under the pension plan), could become entitled to a pension with only 15 years of service, as a result of being affected by that shutdown, provided the employee's combination of age and service reached certain totals. (In this regard, for the person age 55 or older that total needed to be only 70, while in the case of an employee under 55 the total was 80 -- clearly favoring older employees.)

In connection with the study, the company determined what each employee who was pension-eligible, or could so become during a two year period following termination, would have been entitled to receive had he or she been terminated on the date of the layoff; that is, the value of each affected person's vested pension benefits. Added to this was the severance allowance to which they would have been entitled had they not been pension eligible. The resulting figure was considered to be "available shutdown benefits." Then the pension benefits received as a consequence of having been affected by a shutdown were determined.

Not surprisingly, the benefits received by pension-eligible employees exceeded [illegible]-calculated "available shutdown benefits" by more than [illegible],000. This represents an average additional payment of over $55,000 per person to those who were pension-eligible; that is, to the older employees affected.

Impact on Pension Funding

Not only does benefit plan integration not adversely impact older workers, in considering its elimination, these

Committees must also carefully consider the resulting impact on benefit funding, particularly in the pension plan area. Pension funding is based on actuarial assumptions concerning the amounts which are and will become payable to employees under the existing provisions of the plan. To the extent that this legislation would preclude the integration of pension plans with other sources of available income, such as Social Security offsets, and prohibit the termination of Social Security bridge payments at age 62, it will invalidate the assumptions on which existing plans have been funded and substantially increase the cost of benefits to be borne by pension trust funds, thus increasing the unfunded liability under such plans.

Similar cost increases will be seen in welfare plans to the extent that they can no longer be integrated with pension plans and other funding sources, such as Medicare and Social Security Disability payments.

The resultant "double dipping" may benefit a few, but at a cost of reduced benefit levels to all.

Impact on Collective Bargaining

Most of today's employee benefit programs had their genesis in the collective bargaining process. Labor unions, speaking on behalf of their member employees, negotiate with employers for those benefits most needed and desired by their membership. Trade-offs between wages and benefits and among various types of benefits, prioritization of the needs and desires of employees and determinations as to the limits of what can reasonably be provided are among the normal functions of these union representatives.

Benefit integration permits a union to obtain the broadest range of benefits for its members, at a cost which requires minimal trade-offs in other areas. By prohibiting such integration, S.1511 and S.1293 foreclose a union's ability to obtain needed benefits for small groups of its members, since the cost associated with spreading such benefits over the entire workforce will generally require compromises in other areas exceeding their value to the general membership.

All collective bargaining agreements are the product of careful negotiation between unions and management. A major determining factor in all such agreements is the projected cost of the agreed to terms. By substantially increasing the future cost of existing benefit packages, this legislation will radically alter the bargains arrived at through the negotiation process.

Employers, unions and employees will find themselves in a difficult dilemma, faced with nothing but unattractive alternatives. Employers may move to reopen existing agreements, seeking reductions in current benefits or concessions elsewhere to offset the unexpected cost increases, attempt to set the agreements aside altogether as invalid, or absorb the cost for the term of the agreement and demand substantial overall concessions on their expiration.

At a time when American industry, both union and management, is striving for greater cooperation in order to become competitive in a global marketplace, legislative action forcing them into an adversarial posture appears counterproductive at best.

The proposal not only puts at risk hundreds of existing bargaining agreements, it jeopardizes organized labor's ability to minimize the impact of force reductions. Traditionally, in times of industrial reorganization, such as the United States is experiencing today, labor unions have sought to reduce the impact on their membership, and society's various welfare programs, by negotiating early retirement options and "windows." These programs have historically provided increased benefits for those members of the workforce who voluntarily choose to cease working, somewhat sooner than they might otherwise have done, thus preventing the involuntary termination of others who wish or need to continue working.

Providing incentives to those who are willing to self-select permits individual employees to assess their own personal financial and other desires in deciding whether or not to continue working; thus, permitting a force reduction to be accomplished in the most humane manner possible. By outlawing such "windows," the bills deprive older workers of the right to choose enhanced benefits and assures that the brunt of any reductions in force will be borne by those workers whose expenses are generally highest and who can, thus, least afford unemployment.

Similarly, by invalidating existing early retirement programs, these bills would prevent older employees, whose personal and financial situations permit them to do so, from electing to leave the workforce prior to normal retirement age and pursue other interests or simply extend their period of retirement.

The Cost-Justification Test

The proposals' adverse impact on older workers can be seen in the logical results of the application of its cost-justification test. Few employers reduce benefit coverage to active employees. Such reductions normally take place at or after retirement. However, an obvious way of recouping some of the unexpected costs inherent in this legislation would be to take advantage of this provision and commence benefit reductions much earlier.

Such reductions could be substantial and would aversely impact older workers. The cost of providing health care benefits and life insurance, to name but two, increases substantially with age. Incremental reduction in these benefits, tied to the cost of their provision, would seriously erode the benefits available to active older workers.

Of course, this alternative is premised on the assumption that employers would actually be able to cope with the administrative labyrinth of accurately determining the cost of providing each element of their benefit package to each employee age group. By far the simpler, and more economical, means of solving its dilemma would be for the employer to terminate all of its existing benefit plans and to provide each employee with a given number of dollars, permitting them to purchase their own benefits. For virtually all workers, the benefits available under such a system would be substantially less; and the older the worker, the harder hit he or she would be.

Retroactivity

Retroactive application of any statute is to be avoided, in that it deprives citizens of their fundamental right to rely on the law as it existed at the time actions were taken. In a statute which would have the sweeping, revolutionary impact on the vast majority of this nation's existing employee benefit plans found in S.1511 and S.1293 such a provision is manifestly unjust.

For decades, employers, labor unions and employees have looked to the "non-discrimination" tests established by the Internal Revenue Service and, for the last 15 years, have relied on the myriad ERISA regulations and judicial decisions delineating their rights and obligations to assure themselves that benefit programs, and their implementation, conformed to applicable law. Particularly given the extensive history of most such programs and the fact that the United States Supreme Court, as early as 1977, in United Airlines v. McMann, determined that any benefit plan which pre-dated ADEA could not constitute a subterfuge, retroactive application of the proposed legislation would be unreasonably egregious.

If Congress is to redefine the way in which employers establish and maintain benefit programs, it should be done only on a prospective basis, providing ample opportunity for the overall redesign of such programs which compliance will require.

CONCLUSION

The proposed legislation is, quite simply, unwarranted. It represents a radical departure from the law which existed prior to the Betts decision, substantially alters 25 years of legal precedent applying anti-discrimination statutes, undermines the validity of guidelines, practices and judicial interpretations of ERISA, places an undue strain on labor/management relations at a time when American industry can least afford it, threatens the soundness of benefit funding assumptions, establishes a cost-justification test with which few, if any, employers can comply and will adversely impact the very persons it is allegedly designed to assist. Even absent the necessity to redesign most existing employee benefit packages, the proposal is ill-conceived.

AISI, NAM and their member companies, are all fully committed to the rights of America's older workers. However, without a clear articulation of the perceived societal problem at issue, it is impossible to craft a legislative response which can resolve that problem, while retaining the positive features of today's fringe benefit packages. To date, the nature and parameters of the asserted problem remain murky at best and do not justify the extensive ramifications to be found in S.1511 and S.1293. Until the precise problem has been articulated, no legislative "solution" should be enacted.

Senator Metzenbaum. Some Senators may wish to submit written questions to some of the witnesses. The record will be kept open for 2 weeks so that those questions can be answered and any additional written testimony received.

Senator Metzenbaum. Now I would like to ask you, Mr. McCarthy, what is your view of the approach to disability benefits taken by the State of Ohio in *Betts* and would you ever use or recommend such an approach?

Mr. McCarthy. The approach used in that particular case is sort of a longstanding approach in public employers but rarely, if ever, used with private employers.

In fact, the evolution of disability and pensions plans has clearly been to separate those benefits over time. And as employee benefits consultants we recommend the combination of those plans today.

Senator Metzenbaum. Mr. Deets and Mr. Mackaronis, I would like to ask you a question. The series of early retirement or exit incentive programs that would be lawful under the ADEA before *Betts*, is there any common theme to these? Some critics suggest that a retirement incentive must have an upper age limit because otherwise it would be little more than a retirement bonus and the employer would not use it.

Do you agree with that argument, and is there any empirical data regarding the prevalence or success of programs that do not have an upper limit?

Mr. Deets. Senator, the common characteristics that I would note are that such plans are voluntary, older workers are not denied the opportunity to participate and the benefit is not reduced on the basis of age. Those would be the ones where they are legal and acceptable.

As far as the bonus, I think that all of them are bonuses. They may have a different name or form, but I think they are bonuses. And I dispute the fact that employers would not be able to control the costs. I have a lot more confidence in American industry.

Senator Metzenbaum. Thank you very much.

Mr. Mackaronis, would you care to comment?

Mr. Mackaronis. I agree with that, Senator, and would like to add just one thing. Distilling all this, there are two ways to offer a retirement incentive: One is to offer it to everybody above a certain age for a very limited period of time. Those work, they are widespread in the industry, and I listed a number of them on my chart.

The other way to make them work is to offer the benefits based on age, to offer them like they did in the *Cipriano* case to people based on age between 55 and 60. And what those benefits do is penalize people for exercising their lawful right to work beyond 60.

I might add, Senator, that in the *Carlin* case, almost quoting from Judge Posner, one of the country's most respected jurists, he characterized that as precisely the type of discrimination that the ADEA was designed to prohibit.

So I think there are two ways to do it. One is lawful, and the other is age-based and for that reason unlawful. And they are based on a misperception about why people leave the work force and when they do it. They are stereotypical assumptions, and that is precisely why they are unlawful.

Senator **Metzenbaum**. May I ask a question of those who are here representing the business community. You have heard Mr. Mackaronis and Mr. Deets describe a series of lawful incentive programs. Let me quote also from the House testimony delivered by attorney Ellen Fredel, a Washington, DC, practitioner who has 10 years of experience counseling employers on employee benefit plans.

She said, "Several clients I advise have adopted early retirement incentive plans or exit incentive plans and have done so without drawing any age discrimination claims. How did we do this? First the employers gave employees time to decide, usually 60 to 90 days, and plenty of information."

"Second," continuing her statement, "early retirement incentives were offered to all workers and specified the divisions were over a certain age, usually age 55. I do not think that employers need age-bracketed early retirement plans to achieve downsizing. Finally, employers try to accentuate the positive benefits of retirement and not the threats of termination."

My question is: Do you contend that employers will be unduly burdened by having to comply with a rule that so many seem to be living with quite easily now?

Mr. Dichter, go ahead.

Mr. **Dichter**. Yes, Senator Metzenbaum. And I think as you will recall, the EEOC agrees with business' position on this issue. Both the general counsel as well as the vice chairman both stated today that they recognized, as in *Cipriano*, the need for having an upper age limit for the incentive. Age 60 was appropriate. That was the position EEOC took in *Cipriano*. That was the position that was upheld by the court in *Cipriano*.

As I believe, one of the two, and I don't recall which one, said if you simply had the $10,000 incentive for everyone it wouldn't be much of an incentive, it wouldn't work very well because people who were about to retire anyway and leave voluntarily without the incentive would simply get a $10,000 bonus. That's why that kind of system wouldn't work.

The incentive is to get people to leave before they would have otherwise left. That's why you frequently need sliding scales to accomplish that.

Senator **Metzenbaum**. Any of the other witnesses?

Mr. **McDowell**. Yes, Senator. Employers often find that they have to lay off X number of people, maybe 20 or 50 people, and there may be several thousand people or at least a larger number than 20 that are eligible for retirement. If they offer the incentive program to everybody, then they have an oversubscription and a lot more people leave than they can afford to leave. They lose trained workers and they may have to rehire younger workers that aren't as skilled and they in effect lose money in that situation.

The other thing is, on the benefit package approach, the Interpretive Bulletin allows the integration of benefits now, all sorts of benefits. The real issue is whether or not it allows an employer to integrate its pension plan and retirement plan within that integration of benefits.

There is a general principle that the business community has fought for, and that is the integration of benefits. The only issue really is whether the EEOC was correct in excluding pension and retirement plans. And I think as most of us are aware, when an employer sits down to negotiate with its unions, it negotiates everything. It negotiates a whole package. In fact, many times it will give, far from discriminating against retirees and older workers, it gives them a pretty healthy health package, which has caused some economic problems for some employers.

Senator **Metzenbaum**. I want to thank all of the witnesses and indicate that our record will remain open. If you care to supplement your statement in any way, we would certainly be glad to hear from you.

I want to comment that I am a little bit squeamish about the fact that we have eight witnesses sitting before us this morning, and I am glad that the EEOC is not investigating the question of discriminatory policies vis-a-vis women and men testifying. [Laughter.]

We have no women testifying here today. But my guess is that the EEOC won't make an inquiry on that subject.

I am happy to have each of you with us. Thank you so much for your help.

The hearing stands adjourned.

[Whereupon, at 1:15 p.m., the committees were adjourned.]

[Appendix follows]

QUESTIONS OF SENATOR PRYOR FOR VICE CHAIRMAN SILBERMAN

1. As I understand it, the "equal benefit or equal cost" test has existed in some official form for 20 years. Can you give us a history lesson (about) your "equal benefit or equal cost" regulation and why the EEOC feels that it represents the correct interpretation of section 4(f)(2)?

Shortly after the enactment of the ADEA in 1967, the Department of Labor, which originally administered the Act, issued an interpretation of Section 4(f)(2). That interpretation allowed employers to discriminate against older employees in the provision of benefits where the cost of such benefits was more expensive for older employees.

In 1978, Congress amended the ADEA to overrule the United States Supreme Court's decision in United Air Lines v. McMann. During congressional consideration of the amendment, there were numerous legislative comments about application of the section 4(f)(2) exception to various types of "employee benefit plans." Congress called for the Secretary of Labor to issue interpretive guidelines on the subject of "employee benefit plans."

In May 1979, the Department of Labor issued an Interpretive Bulletin on application of the Section 4(f)(2) exception to "employee benefit plans." The IB expanded in great detail upon guidelines which had been issued in 1969. The original guidelines stated, in part, that "[a] retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of the payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." The original "equal-benefits-or-equal-cost" principle was apparently intended as a "safe harbor" rule for establishing the absence of any "subterfuge to evade the purposes of the ADEA." With certain exceptions and consistent with legislative comments by the 1978 Congress, the new IB adopted the "equal-benefits-or-equal-cost" principle as the sole means of establishing the absence of "subterfuge."

Authority to administer and enforce the ADEA was transferred from the Secretary of Labor to the EEOC effective July 1, 1979. EEOC retained the IB on employee benefit plans.

Under the IB, the employer could prove absence of subterfuge by establishing that age-based reductions in employee benefit plans were justified by significant cost considerations. Benefit levels could be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan would be considered in compliance with the Act where the actual amount of payment made, or cost incurred, in behalf of an older worker was equal to that made or incurred in behalf of a younger worker, even though the older worker may have received a lesser amount of benefits. See 29 C.F.R. section 1625.10(a)(1).

The IB construction is consistent with the EEOC's interpretation of the language of section 4(f)(2). The EEOC has taken the position that in enacting 4(f)(2), Congress meant to shield employee benefit plans with age distinctions only where employers present reasonable economic justifications for doing so. For example, in Betts the Department of Justice and the EEOC interpreted the legislative history as supporting the conclusion that employers must provide an economic justification before they may provide lesser benefits to older employees. Senator Javits, who introduced the amendment that became section 4(f)(2), explained at the time he introduced it that it was intended to allow employers to provide different benefits to older employees "because of the often extremely high cost of providing certain types of benefits to older workers." Cong. Rec. 31,254-31,255 (1967). The EEOC argued in Betts that since the exception was intended to authorize employers to grant lesser benefits to older employees where benefits are more costly to provide to those employees, it is sensible to require employers to provide a cost justification in order to invoke section 4(f)(2).

2. Do you believe that S. 1511 accomplishes the goal of returning this area of the ADEA to the status quo before Betts?

Yes, if a provision for voluntary early retirement incentives is added. Before Betts, the courts of appeals agreed that section 4(f)(2) generally required cost justification. See Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 Univ. Pa. L. Rev. 1055, 1082 (1987) ("[i]t [was] clear that section 4(f)(2) [was] not intended to make lawful employee benefit plans that make unequal expenditures for older workers," and that "[a]n employer complies with section 4(f)(2) by spending the same amount on benefits for older workers as for other employees, even if those equal expenditures do not provide equal benefits."). Additionally, the district court in Cipriano v. Board of Education, adopting EEOC's position, evaluated a voluntary early retirement incentive program in terms of whether the employer had proven legitmate business reasons for the incentive. The court agreed with EEOC that the IB's "equal cost" rule did not apply to ERIs (see question 3 at page 4, infra). The EEOC believes that early retirement incentive programs that are completely voluntary and further the purposes of the ADEA as set forth in Section 2(b) should remain lawful under the ADEA. With the addition of a provision to this effect in S. 1511, the legislation would return the law to the status quo before Betts. To the extent such programs are challenged, their legality would then continue to be adjudicated on a case-by-case, fact-specific basis in light of their intent and actual operation.

3. I understand that the only business group to oppose the Interpretive Bulletin containing the equal benefit or equal cost test was Westinghouse Electric Corporation. Is Westinghouse involved in litigation concerning the validity of that Bulletin? What is EEOC's position? How much money is involved? What has been the outcome in the courts so far?

Yes. In EEOC v. Westinghouse, the EEOC challenged Westinghouse's policy of denying severance pay to retirement eligible employees. Westinghouse was unable to justify this discrimination by age-related cost factors. Tens of millions of dollars is involved in the case. The United States District Court for the Eastern District of Pennsylvania and the Third Circuit Court of Appeals found the policy unlawful under the ADEA. EEOC v. Westinghouse Electric Corporation, 632 F. Supp. 343 (E.D. Pa. 1986), affirmed, 869 F. 2d 696 (3d Cir. 1989). On October 2, 1989 the Supreme Court reversed the decision of the Third Circuit and remanded to the Third Circuit for reconsideration in light of the Supreme Court's decision in Betts.

QUESTIONS OF SENATOR PRYOR FOR GENERAL COUNSEL CHARLES SHANOR

1a. Prior to the Betts decision, was a cafeteria type benefit plan, where an employee selects from a menu of benefits offered, legal under the ADEA even though workers might not get the same benefits?

Yes, so long as the employee selection was voluntary and all employees were offered the same menu of benefits.

b. Was it legal because it was not a discriminatory practice under section 4(a) of the Act, or was it because it qualified for

the 4(f)(2) exception from the Act?

It was not unlawful under section 4(a) to give all employees the same choices even though the employees might exercise those choices differently.

c. Would this type of plan continue to be legal if S. 1511 became law?

Yes. There would be no section 4(a) violation.

2. Aren't legitimate early retirement incentive plans, those which do not illegally force retirement, similar to cafeteria plans in that as long as everyone is allowed to choose from the same menu, there is no violation of 4(a)?

Yes. However, the EEOC believes that certain early retirement incentives that do violate section 4(a) further the purposes of the ADEA and should be lawful.

3. Can you give me examples of legitimate early retirement incentive plans which would become violations of the ADEA if S. 1511 is passed?

EEOC took the position that the early retirement incentive program in Cipriano v. City School District of North Tonawanda was lawful even though it was not cost-justified. As explained in EEOC's briefs (copies attached), the EEOC viewed the early retirement incentive program as a voluntary plan providing a valuable benefit to older workers that would not have been offered to employees if the "incentive" were converted into a "bonus" by removal of the age cap. The district court agreed with EEOC that this plan was not a "subterfuge" to evade the purposes of the ADEA (copy of opinion attached). However, this plan would be unlawful under S. 1511 as presently drafted.

4. Would you agree that severance pay is not age sensitive in terms of cost, and that under the ADEA prior to the Betts decision severance pay had to be offered equally to older workers and younger workers alike, and if so, why?

Yes. It will cost an employer no more to provide severance pay to a 60-year-old employee with 20 years of service than a 40-year-old employee with 20 years of service. In each case, the cost to the employer is the same.

Before Betts, an employer policy that provided for severance pay to non-retirement eligible employees, but not to retirement eligible employees, violated section 4(a) of the ADEA because of the inextricable link between retirement eligibility and age (i.e., discrimination on the basis of retirement eligibility is equivalent to discrimination on the basis of age). The EEOC successfully argued that employers could not utilize the section 4(f)(2) exception because severance pay discrimination could not be cost justified, and that severance pay had to be offered equally to older workers and younger workers.

5. Would you explain whether, prior to Betts, it was a violation of the ADEA for an employer to offset severance pay with pension benefits for pension eligible employees?

Prior to Betts, it was considered unlawful for an employer to offset severance pay with pension benefits for pension eligible employees only.

6. Would S. 1511 require the elimination of any planning techniques used by employers in setting up benefit plans which were legal prior to Betts?

No.

7. Does the retroactivity provision in S. 1511 adequately aid you with the employee benefit cases that you now have pending?

S. 1511's provisions on retroactive implementation may not protect all aggrieved individuals. For example, it is not clear that the existing provisions would revive actions or proceedings dismissed post-Betts and prior to passage of legislation. It is also not clear that the bill would revive claims not presented to EEOC, or charges in the administrative process, where the statute of limitations expired post-Betts and suit was not filed before the running of the statute because no cause of action existed post-Betts. We are not addressing the constitutional problems which may be created by retroactive application of S. 1511 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

8. Is there any need to toll the statute of limitations for people who have given up on filing charges in benefits cases because of Betts?

Yes. See answer to question 7.

9. What if a severance pay offset is collectively bargained? What is your view as to whether an employer and union may waive the rights of individual employees regarding discrimination in employee benefits under the ADEA?

Employers and unions have never been permitted to waive individual rights under fair employment statutes, including the FLSA, Title VII, and the ADEA. As the Supreme Court stated with reference to Title VII rights, "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

10. What material differences exist between S. 1511 and S. 1293? Which bill more closely reflects the EEOC's position as expressed in regulation and litigation?

S. 1511 requires "significant" cost considerations, whereas S. 1293 only requires "cost considerations" to justify age based reductions in employee benefit plans. Sec. 2(2) of S. 1293 states that Congress finds that the Act prohibits discrimination in employee benefit plans except for reductions that are justified by cost considerations that are related to age. In Sec. 2, S. 1511 states that Congress finds legislative action necessary to clarify that the Act prohibits discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

S. 1511 creates a new section 4(f). It leaves section 4(a)(1) unchanged. Section 4(f)(2)(A) declares it "not unlawful" for an employer to observe the terms of a bona fide seniority system that is not intended to evade the purposes of the Act. S. 1293 is the same except that it uses the word "subterfuge" instead of "intended". Historically, adding content to the word "subterfuge" has been the most difficult interpretation problem under the ADEA.

S. 1511 states that a seniority system shall not require or permit the involuntary retirement of any individual because of such individual's age. This language tracks the present language of section 4(f)(2). It is not present in S. 1293.

S. 1293 omits the clause "no such employee benefit plan shall excuse the failure to hire any individual. . ." which is contained in Sec. 4(f)(2) of the ADEA and in S. 1511.

The bills address the equal benefits or equal cost approach to benefits discrimination differently. Under S. 1511, following the commission's regulations under 29 C.F.R. section 1625.10, a benefit package approach could not be applied to a retirement or pension plan. Such an approach may be permissible under S. 1293. S. 1293 makes reference to neither a benefit-by-benefit nor a benefit package approach and makes no reference to 29 C.F.R. section 1625.10. S. 1293 makes it lawful to observe the terms of a bona fide employee "benefits" plan even though the older worker may receive a lesser amount of "benefits," whereas S. 1511 makes it lawful to observe the terms of an employee "benefit" plan. By using the term "benefits plan" instead of "benefit plan", S. 1293 may allow a benefits integration approach that would permit an employer to escape liability where the total cost incurred for benefits on behalf of a younger worker is equal to the total cost incurred for benefits on behalf of the older worker. (It is not unlawful "to observe the terms of a bona fide employee benefits plan where the actual amount of benefit payment made or cost incurred on behalf of an older worker is equal to that made or incurred on behalf of a younger worker . . . ."). Under S. 1293, comparisons under section 4(f)(2) might never be necessary on a benefit-by-benefit basis, but may be allowed in all cases on a benefit package basis. S. 1511, on the other hand, would allow the employer to utilize a benefit package approach only where currently permissible under 29 C.F.R. section 1625.10 which allows a limited benefit package approach for employee benefit plans which fall within section 4(f)(2).

The bills have similar language to reverse United Airlines v. McMann, 434 U.S. 192 (1977), which held that pre-Act plans cannot violate the Act.

The bills have similar language on the burden of proof. However, S. 1293 places the burden on the employer to prove the elements of a claim that it discharged or otherwise disciplined an individual for good cause.

S. 1511 precludes a claim for benefits discrimination by a younger protected age group worker by making it clear that, where benefits are concerned, the ADEA allows an employer to extend additional benefits to older workers that are not extended to younger workers also protected by the ADEA. See Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988). This is consistent with the EEOC's regulation at 29 C.F.R. section 1625.2(b). S. 1293 makes no such distinction.

S. 1511 will apply retroactively to all cases brought after June 23, 1989 and to all cases brought before that date and still pending on that date. S. 1293 is silent on retroactivity. We are not addressing the constitutional problems which may be created by retroactive application of S. 1511 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

QUESTIONS FROM SENATOR METZENBAUM FOR VICE CHAIRMAN SILBERMAN

1. On early retirement incentive plans, I understand your position to be that some plans are lawful and some unlawful under current law. Could you please give an example of a plan that is unlawful under the ADEA and should remain so? Also, give an example of a plan that you believe is lawful but could be jeopardized by the language of S. 1511?

(A) An early retirement incentive plan that provided a lesser benefit to older workers and was intended to discriminate against older workers in a non-fringe benefit aspect of employment would be unlawful under current law, was unlawful pre-Betts, and would be unlawful under S. 1511.

(B) Generally, early retirement incentives that are not intended to discriminate in a non-fringe benefit aspect of employment are lawful under current law (i.e., post-Betts). Such incentives would be unlawful under S. 1511 unless they satisfied the "equal benefits or equal cost" test. Pre-Betts, the EEOC took the position in Cipriano v. City School District of North Tonawanda that the employer's early retirement incentive program was lawful even though it was not cost-justified. As explained in EEOC's briefs (copies attached), the EEOC viewed the early retirement incentive program as a voluntary plan providing a valuable benefit to older workers that would not have been offered to employees if the "incentive" were converted into a "bonus" by removal of the age cap. The district court agreed with EEOC that this plan was not a "subterfuge" to evade the purposes of the ADEA (copy of opinion attached). The North Tonawanda plan would be unlawful under S. 1511.

QUESTIONS FROM SENATOR METZENBAUM FOR GENERAL COUNSEL SHANOR

1. Generally, what position has EEOC taken regarding the possibility that severance pay and pension plans can be part of a single benefit package? Please explain your reasoning and the court decisions on this issue.

The benefit package approach under the Interpretative Bulletin provides that the cost of a benefit package can be used to determine whether an employer paid equal costs for older and younger employee benefits for purposes of the section 4(f)(2) exception, but that a benefit package cannot be used to determine whether the employer provided equal benefits under section 4(a)(1). In other words, the benefit package approach could be used to justify the discrimination [i.e., to establish absence of subterfuge under section 4(f)(2)] but could not be used to determine whether discrimination had occurred [the issue under section 4(a)(1)]. When determining whether the employer actually incurred equal cost on behalf of the older worker, the general rule under section 1625.10(f)(2) is that "[a] 'benefit package' approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees." Subsection (ii) of section 1625.10(f)(2) prohibits placing both pension and non-pension benefits in one benefit package ("A benefit package approach shall not apply to a retirement or pension plan.").

The benefit package approach was designed to allow employers and their employees the flexibility to develop mutually advantageous benefit packages, that is, older workers could continue to receive the same level of a certain fringe benefit particularly valuable to them, and employers could avoid higher benefit costs by reducing the level of some other benefit more than would otherwise be permissible. For example, if an employer has two employee benefit plans, one providing life insurance and the other long-term disability, and if age-based cost increases would permit a 10% reduction in each benefit and if both benefits cost the same to provide, the benefit package approach might permit the employer to provide the full amount of the life insurance while reducing the level of long term disability by 20%.

Pre-Betts guidelines placed the following limitations, among others, on benefit packaging: 1) the overall package could not be of lesser cost to the employer nor could the overall package provide less favorable overall benefits for employees; 2) the approach could not be applied to pension or health benefits; and 3) the approach applied only to employee benefit plans that fall under section 4(f)(2). See, generally, 29 C.F.R. section 1625.10(f)(2).

The benefit package approach has sometimes been confused with the theory of benefits integration.[1] Simply stated, the integration issue is whether certain benefits, such as severance pay and pension payments or disability pay and retirement pay, should be considered a "single coordinated benefit" for purposes of the ADEA. Generally, as discussed more fully below, an employer's defense to certain ADEA benefit actions is facilitated if the employer's severance and pension benefits are viewed as providing one employee benefit. This determination has been made by courts on a case-by-case basis. The result has been that some courts have found severance and pensions "integrated," and some have not. For example, in Abenante v. Fulflex the United States District Court for the District of Rhode Island found that the severance and pension programs at issue before it "were part of a 'single coordinated benefit plan,'" but in EEOC v. Westinghouse, 725 F. 2d 211 (3d Cir. 1983), and EEOC v. Borden's, Inc., 724 F. 2d 1390 (9th Cir. 1984), the Third and Ninth Circuit Courts of Appeals, respectively, held that the separation and pension plans before them were separate and distinct benefit plans, and not part of a single coordinated plan. For the most part, the EEOC has argued that pensions are not a substitute for severance pay and that pensions and severance are distinct benefits. Generally, courts have found that the severance and pension programs in issue before them were not "integrated".

The integration theory arises within the context of sections 4(a) and 4(f)(2) of the ADEA. Section 4(a) broadly prohibits age discrimination by employers. Section 4(f)(2) of the ADEA has an employee benefit plan exception. Pre-Betts, this exception was relevant only where there was a showing of a prima facie violation of section 4(a). The party claiming the shelter of section 4(f)(2) had the burden of proving all the elements of the exception. Those elements were: 1) the existence of a "bona fide employee benefit plan"; 2) an action that "observe[d] the terms" of the plan; and 3) the absence of subterfuge to evade the purposes of the Act.

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[1] During some of our early discussions with Congress we may sometimes have used the terms "benefit package" and "benefits integration" interchangeably. The concepts are quite different, however.

Integration seems to have became an ADEA theory in response to court holdings that "bona fide employee benefit plans" include only those types of plans where the cost of benefits increases with age. These courts found that even though the language of section 4(f)(2) -- "such as a retirement, insurance or pension plan"-- was intended to be descriptive, the description has substance and limits the 4(f)(2) exemption to plans providing benefits based upon age-related cost factors.

Courts have rejected severance pay plans as independently protected plans because they provide a benefit unrelated to age/cost factors [and thereby are not bona fide employee benefit plans within the meaning of section 4(f)(2)]. In contrast, pension plans are protected because they do provide such a benefit [and are specifically approved for the section 4(f)(2) exception]. Consequently, employers have argued that their pension and severance pay "plans" are, in fact, integrated parts of a single coordinated "pension-type" plan. This "integrated plan," according to the argument, generally provides benefits which cost more as age increases.

The Third Circuit Court of Appeals in EEOC v. Westinghouse and the Ninth Circuit Court of Appeals in EEOC v. Borden's, Inc. rejected the "integration" argument, holding that the severance and pension benefits at issue were functionally independent, and that this independence established that the severance pay was not an integral part of the pension plan.[2] The courts gave little consideration to whether the discrimination in benefits was actually justified by age related costs because this was generally considered a "subterfuge" question. The courts did not need to decide if the plans were a "subterfuge to evade the purposes of the Act" unless they first found that the plans were of the type eligible to utilize section 4(f)(2). Presumably, under the integration theory, if a court accepted that severance pay was an integral part of an employer's pension plan, and thus was "a bona fide employee benefit plan," the court would have had to determine whether the plan was a "subterfuge to evade the purposes of the ADEA." If the court followed the IB, the court would decide the subterfuge issue by determining whether the employer had demonstrated that the discrimination resulted from greater cost for older worker benefits.

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[2] The Borden's court noted, however, that "a severance pay policy which is an integral part of a complex benefit scheme might be regarded differently." 724 F.2d at 1396.

If a court accepted the integration theory, it would affect the analysis under section 4(a) as well as under section 4(f)(2). Section 4(a) discrimination under a coordinated severance/pension plan might be determined by comparing the value of the younger employee's combined severance and pension benefit with the value of the older employee's combined severance and pension benefit. Absent "integration," section 4(a) discrimination is determined separately for pension and severance.

If section 4(a) discrimination existed, the employer could defend under section 4(f)(2) on the basis that the cost of the older worker's "integrated benefit" was equal to or exceeded the cost of the "integrated benefit" provide to the younger worker.

Theoretically, one could "package benefits" under wholly separate non-integrated plans. And, if the IB allowed an employer to package severance with pensions, an employer would not need to utilize the integration theory for purposes of establishing absence of subterfuge under section 4(f)(2) because it could seek to prove equal costs after placing severance and pensions in one "package." The employer might still seek, however, to utilize the integration theory to qualify for the section 4(f)(2) exception [i.e., to establish that it has the type of plan that qualifies for the 4(f)(2) exception because it is the type of plan where costs increase with age], or to defend under section 4(a) [i.e., to establish that when severance and pensions are considered together, the older employees received the greater benefit, and thus were not victims of discrimination].

If Congress codifies the Commission's benefit-by-benefit and benefit package approaches contained in 29 C.F.R. section 1625.10(c)(2) and (f), the issue of whether an employee's severance and pension benefits are in actuality parts of one coordinated benefit may be sufficiently fact-specific that "integration" will remain an open question under either S. 1293 or S. 1511. "Much uncertainty exist[ed pre-Betts] as to whether a plan [was] part of an integrated benefit scheme." Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a

"Plan"?, 135 UNIV. PA. L. REV. 1055, 1082 (1987).[3] See also EEOC v. Borden's, Inc., 724 F. 2d 1390, 1396 (9th Cir. 1984) That uncertainty would continue under either S. 1511 or S. 1293 -- neither discusses whether, or to what extent, severance pay and pensions can be considered to be one coordinated benefit.

2. What if a severance pay offset is collectively bargained? What is the view of the General Counsel as to whether an employer and union may waive the rights of individual employees regarding discrimination in employee benefits under the ADEA?

Employers and unions have never been permitted to waive individual rights under fair employment statutes, including the FLSA, Title VII, and the ADEA. As the Supreme Court stated with reference to Title VII rights, "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

3. Let me ask you about the bill's language in section 5 regarding the effective date. As a principal author, I believe our intent was to preserve the status of all cases pending before Betts was decided. If the legislation is enacted, no case will be decided on the basis of the Supreme Court decision in Betts, including the Betts case itself. Is that consistent with you understanding of the bill? Do you see an especially strong case for retroactivity here? Why?

S. 1511's provisions on retroactive implementation may not protect all aggrieved individuals. For example, it is not clear that the existing provisions would revive actions or proceedings dismissed post-Betts and prior to passage of legislation. It is also not clear that the bill would revive claims not presented to EEOC, or charges in the administrative process, where the statute of limitations expired post-Betts and suit was not filed before the running of the statute because no cause of action existed post-Betts.

Civil rights compliance obligations are normally imposed prospectively. The retroactive obligation imposed by S. 1511 -- not to discriminate in the provision of fringe benefits based upon age except where benefits cost more for older workers -- is thus a departure from this norm. The basic reason for this departure is that the Labor Department, EEOC, and every federal court decision before the Supreme Court decision in Betts had construed the ADEA as imposing precisely that compliance obligation upon the vast majority of employers, particularly those whose plans have been created or amended over the past twenty years. Thus, employers who attempted to comply with the law -- by following administrative and judicial interpretations of the law -- will not be affected if S. 1511 is retroactive. Only the employer which ignored pre-Betts agency and judicial guidance or which began post-Betts to discriminate in the benefits area will be affected by retroactivity. From EEOC's perspective, retroactivity would enable the agency to continue its enforcement of the ADEA in the provision of fringe benefits without disruption. We are not addressing the constitutional problems which may be created by retroactive application of S. 1511 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

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[3] In his article, at page 1085, Mr. Reinhart concluded that the question of integration will depend on the facts of each case and the weight given to each criterion by the deciding court.

QUESTIONS FROM SENATOR JEFFORDS

1. The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations. Please explain.

Neither S. 1511 nor S. 1293 should require a change in EEOC's position concerning the use of actuarial assumptions and tables in the computation of the costs of employee benefits. Under each of these bills, actuarial predictions could be used under section 4(f) to justify age distinctions. To the extent that the cost of benefits varies according to age and life span, employers would be able to use actuarial tables to justify the difference in cost.

2. Do you believe that the retroactive application of S. 1511 will have any impact on the statute of limitations applicable to

ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

S. 1511's provisions on retroactive implementation may not protect all aggrieved individuals. For example, it is not clear that the existing provisions would revive actions or proceedings dismissed post-Betts and prior to passage of legislation. It is also not clear that the bill would revive claims not presented to EEOC, or charges in the administrative process, where the statute of limitations expired post-Betts and suit was not filed before the running of the statute because no cause of action existed post-Betts. We are not addressing the constitutional problems which may be created by retroactive application of S. 1511 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

3. Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

No. Last year the EEOC issued two advance notices of proposed rulemaking to gather information about employers' and employees' experience under the Interpretive Bulletin. The comments received in response from employers and employee representatives -- with the notable exception of Westinghouse Corporation -- generally expressed support for the basic provisions of the Interpretive Bulletin and only advocated changes of a technical nature to update it.

4. Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

No.

5. In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills.

Employers who have elected not to comply with the EEOC's long-standing guidelines will be required to bring employee benefit plans into compliance with those guidelines.

6. Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

The EEOC knows of nothing incompatible between the S. 1511 or S. 1293 and ERISA, the Internal Revenue Code, or any other provision of law. ERISA does not generally deal with issues of age discrimination in employee benefit plans; the Internal Revenue Code does not at all. The ADEA, however, provides very specific protections to older workers. The legislative history of the ADEA demonstrates a clear Congressional intent that ERISA and the ADEA be read harmoniously. Thus, benefit plan protections for employees in ERISA would not be affected by the proposed legislation just as the ADEA's protections against age discrimination are not superseded by ERISA.

7. In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?

It some cases it would be viewed as a back door form of mandatory retirement.

8. A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answers in detail.

The EEOC believes that the uncertainty that existed pre-Betts concerning whether severance pay was part of one coordinated pension plan will remain under either S. 1511 or S.

1293. Neither bill discusses whether, or to what extent, severance pay and pensions can be considered to be one coordinated benefit. See Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 UNIV. PA. L. REV. 1055, 1082 (1987)[4] ("Much uncertainty exist[ed pre-Betts] as to whether a plan [was] part of an integrated benefit scheme."). We believe S. 1511 is designed to restore the law to its pre-Betts state by leaving open what was open (e.g., integration) and closing what was closed.

The EEOC believes that the central issues involved in the legislation are whether and to what extent benefits to older workers are to be protected under the ADEA, and whether the law concerning benefits discrimination against older workers should be restored to the pre-Betts interpretations of the Executive Branch.

QUESTIONS FROM SENATOR HATCH

1. Do you know what the Administration's position is on this matter? If not, do you know whether and when we can expect to hear the Administration's views?

As part of the Administration, EEOC has cleared all of its testimony and communications with Congress on the Betts issue and on S. 1511, S. 1293 and H.R. 3200 with the Office of Management and Budget. EEOC is working closely with other departments and entities of the Administration on this legislation and is unaware at this time of any additional comments or views beyond those communicated by EEOC.

2. If S. 1511 is enacted in its current form, do you have any estimate on how many collectively bargained agreements will have to be re-opened in order to conform? How many employees are covered by these agreements? What industries would be most affected?

The EEOC believes that most collectively bargained agreements are in conformity with the EEOC's ADEA guidelines and thus in conformity with the requirements of S. 1511.

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[4] In his article, at page 1085, Mr. Reinhart concluded that the question of integration will depend on the facts of each case and the weight given to each criterion by the deciding court.

3. Do you know how many states other than Ohio have a plan similar to the one at issue in Betts?

EEOC does not know the total number of states having a plan similar to the one at issue in Betts.

4. Approximately what percentage of cases brought by the EEOC challenging employee benefit plans under the Age Act involve plans provided by non-profit organizations? Hospitals? State and local governments? Schools or universities?

Approximately one-third [12 cases] of the EEOC's current cases challenging employee benefit plans under the ADEA involve plans provided by one of the types of organizations listed. Two cases are against non-governmental non-profit organizations. Two cases are against schools or universities. Two cases are against school districts. One case is against a county board of education. Five cases are against other states or local governmental units.

5. Is it correct that while Congress has integrated pension and severance benefits for federal employees, such integration would not be permitted for state and local government employees under S. 1511 or S. 1293?

Congress does not allow federal employees who are pension eligible to receive severance pay.

Generally, the EEOC has taken the position that severance pay and pensions should not be viewed as coordinated components of one integrated benefit and that, under the ADEA, severance payments cannot be denied to older employees because they are pension eligible. However, the uncertainty that existed pre-Betts concerning whether a particular severance pay package and a particular pension plan were parts of one coordinated (or "integrated") benefit will remain under either S. 1511 or S. 1293. Neither bill discusses whether, or to what extent, severance pay and pensions can be considered to be one coordinated benefit. See Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a "Plan"?, 135 UNIV. PA. L. REV. 1055, 1082 (1987)[5] ("Much uncertainty exist[ed pre-Betts] as to whether a plan [was] part of an integrated benefit scheme.").

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[5] In his article, at page 1085, Mr. Reinhart concluded that the question of integration will depend on the facts of each case and the weight given to each criterion by the deciding court.

6. Do you know how many, if any, private or public employers have terminated their employee benefit program(s) after losing a Age Act discrimination case to the EEOC regarding such program(s)?

No

7. In the ten years that this Interpretive Bulletin, including the cost-justification requirement, was in effect did the EEOC at any time analyze the cost of this requirement on business? State and local government? If such an analysis was done, where were its findings?

No. EEOC has never had adequate funding to undertake such a project. Each year since 1982, Congress has appropriated less money than the President requested for EEOC to complete its mission. Because EEOC is a labor intensive agency, we do not have extra resources to divert from our primary responsibility of enforcing the laws against employment discrimination to additional analysis.

8. The EEOC's testimony states as follows: "We see no good policy reason for allowing arbitrary, unjustifiable discrimination against older workers in this one area, when all other aspects of their employment are protected." Is it your view that codification of the "equal benefit or equal cost" approach is the only approach under which we could guard against such arbitrary discrimination?

No. However, the "equal benefit or equal cost" approach has proved workable, and has been widely accepted by the employer community, as evidenced by responses to the EEOC's advance notice of proposed rulemaking. Last year the EEOC issued two advance notices of proposed rulemaking to gather information about employers' and employees' experience under the Interpretive Bulletin. The comments received in response from employers and employee representatives -- with the notable exception of the Westinghouse Corporation -- generally expressed support for the basic provisions of the Interpretive Bulletin and only advocated changes of a technical nature to update it.

9. The EEOC's testimony also noted, in discussing the Betts case, that "the employer had failed to make or even offer any economic justification under Section 4(f)(2), that it cost more to provide disability benefits to older workers." Under either

of these bills, would such an economic justification be sufficient?

An economic justification for age-based reductions in benefits is permissible under the bills to the extent that an employer can show that age-based reductions are justified by the increased cost of the older worker's benefits.

9. (#9 listed twice) The EEOC's testimony referred to cases which are pending before the courts and which, based on your analysis and review, will likely be affected by the Betts decision. Please provide a list of those cases and a description of the issues raised therein?

a. Alcan Rolled Products Co., N.D. WV, No. 88-0133-C. Retirement incentive plan resulted in greater periodic benefits for retiring employees ages 55-64 than those age 65 and older.

b. Allis-Chalmers Corp., N.D. IN, No. S85-694. Plant closing agreement which provided severance benefits to all laid-off employees except those eligible for immediate pensions.

c. American Can Company, E.D. PA, No. 87-6445. Special separation plan provided 2 years of "augmented service credit" to employees ages 50-54, but not those age 55 or older.

d. AT&T, D. NJ, No. 88-1024(CSF). Voluntary termination pay plan restricted to employees under age 65, and paid only reduced benefits to employees ages 61-64.

e. Bethlehem Steel Corporation, E.D. PA, No. 88-0175. Policy of denying severance benefits to permanently laid-off employees who were eligible to receive immediate pensions.

f. Cargill, Inc., D. KS, No. 81-4193. Pet. for Rehearing Pending, 10th Cir., No. 84-2692. Policy of denying long-term disability benefits to employees who become disabled after attaining age 60.

g. Chrysler Corporation, S.D. NY, No. 89-CIV-1347. Permanently laid-off employees who elected a "special early retirement" option were denied severance pay upon termination.

h. City Colleges of Chicago, N.D. IL, No. 88 C 10726, filed Dec. 22, 1988. Voluntary retirement incentive benefits drastically reduced at age 65.

i. City of Clearwater, M.D. FL, Co. 88-1154-CIV-T-15A. Refusal to allow new employees age 45 or older to join a pension plan, or at least to incur equal pension costs on their behalf.

j. City of Mt. Lebanon, W.D. PA, No. 86-438, filed Feb. 26, 1986. Policy of cutting disability benefits for police officers at age 55, and of denying benefits to those disabled after that age.

k. Easter Seal Society of Arizona, D. AZ, No. CIV87-1935 PHX. Defined benefit pension plan failed to credit employee salary increases which occurred after an employee attained age 60.

l. Farmer's Group, C.D. CA, No. 86-6362 TJH. Policy of denying profit sharing contributions and forfeiture allocations to employees working beyond age 65.

m. Fulflex, Inc., D. RI, No. 87-0456B. Appeal dismissed, 1st Cir., No. 89-1179 & 1180. Reducing severance benefits by the "present value" of accrued pension benefits.

n. Los Angeles Unified School District, C.D. CA No. CV88-05865. Policy of cutting off disability benefits at age 60, and denying such benefits to employees disabled after attaining that age.

o. Maryland National Capital Park and Planning Commission, D. MD, No. PN -86-3218. Policy of discontinuing disability benefits when eligible for regular retirement benefits (no later than 55).

p. Nebraska Public Employees Retirement System, D. NE, No. 87-0-681. Retirement eligible employees denied the same right as younger employees to withdraw their contributions to a pension system.

q. North American Phillips Lighting Corp., D. NJ, No. 87-3671. Policy of denying severance benefits to those employees only who are eligible for immediate pensions when laid off.

r. Northwest Airlines, Inc., W.D. WA, No. 85-36W. One of the issues in this case involves a policy of denying some pension contributions for pilots working beyond age 60.

s. Oscar Mayer Company, E.D. PA, No. 88-6904,. Policy of denying severance benefits to employees who elect to receive immediate pensions after being permanently laid off.

t. Public Employees Retirement System Board of Ohio, S.D. OH, No. C-1-87-216. Challenge to a state law which denies disability retirement for employees who become disabled after attaining age 60.

u. Radio Free Europe/RL, D. DC, No. 89-153-LFO,. One of the issues in this case involves a policy of denying severance benefits to employees working beyond age 65.

v. Sierra Community College, E.D. CA, No. 89-0352. One-time retirement incentive offer provided larger payments to retiring employees ages 55-59, than to those age 60 and older.

w. United Air Lines, Inc., N.D. IL, No. 85 C 8375. Long term disability benefits cutoff when employees attain age 60, and denied to employees disabled after attaining that age.

x. United Air Lines, Inc., N.D. IL, No. 88 C 5081. Medicare eligible employees age 65 or over denied the option of converting to individual health insurance coverage upon termination.

y. United States Steel Corporation, W.D. PA, No. 87-2044. Challenge to various age discriminatory provisions for layoff benefits.

z. Wappingers Central School District, S.D. NY, No. 87-CIV-5594. Policy of denying teachers payment for unused sick leave unless they retire before attaining age 60.

aa. Washington County Board of Education, S.D. OH, No. C-1-88-845. Challenge to a state law which denies disability retirement for employees who became disabled after attaining age 60.

bb. Western Union Telegraph Company, S.D. NY, No. 88-CIV-6995. Policy of reducing the amount of severance benefits paid to laid-off employees who are eligible for immediate pensions.

cc. Westinghouse Electric Corporation, D. NJ, No. 80-8053,. Appeal Pending, 3rd Cir., No. 87-5174. Policy of denying severance benefits to permanently laid-off employees who were eligible for pensions.

dd. Westinghouse Electric Corporation, E.D. PA, No. 83-5457. Appeal Pending, 3rd Cir., No. ______. Severance benefits denied to employees who were eligible for immediate pensions.

ee. Wheeling-Pittsburgh Steel Corp., S.D. OH, No. C-2-88-729. Collective bargaining agreement had the effect of denying supplemental unemployment benefits to all employees over age 50.

ff. Wilson Foods Corp., N.D. IL, No. 88-C-4056. Severance pay denied to retirement-eligible employees who elected immediate pensions when a plant permanently closed.

10. What is the current status of the cases referred to in question 9, above? Please identify any cases pending in trial or appellate courts in which the EEOC has requested stays, and a copy of any submission made by the EEOC in seeking such stays.

The EEOC has filed stay motions in 23 cases pending in U.S. District Courts, and in two cases in the Courts of Appeals. Unless otherwise noted, the motion for stay is under advisement.

a. Alcan Rolled Products Co.

b. Allis-Chalmers Corp.

c. AT&T (Request for stay denied).

d. Bethlehem Steel Corporation

e. Chrysler Corporation

f. City Colleges of Chicago

g. City of Clearwater (Motion for stay granted).

h. City of Mt. Lebanon (Request for stay denied.)

i. Easter Seal Society of Arizona

j. Farmer's Group (Motion for stay granted; stayed until December 1, 1989 in deference to bills pending in Congress.)

k. Fulflex, Inc. (Request for stay denied.)

l. Los Angeles Unified School District

m. Maryland National Capital Park and Planning Commission

n. Nebraska Public Employees Retirement System (Request for stay denied.)

o. North American Phillips Lighting Corp.

p. Oscar Mayer Company

q. Public Employees Retirement System Board of Ohio,

r. Sierra Community College

s. United Air Lines, Inc.

t. United States Steel Corporation (Request for stay denied.)

u. Washington County Board of Education

v. Western Union Telegraph Company

w. Westinghouse Electric Corporation (NJ)

x. Wheeling-Pittsburgh Steel Corp.

y. Wilson Foods Corp.

11. Can you identify any other instances in which the EEOC has taken similar action, i.e., sought stays predicated on the possible passage of legislation to retroactively overturn a Supreme Court decision?

No.

12. Do any of these pending cases involve early retirement programs?

Yes. Three cases.

13. Do any of these pending cases involve challenges to pre-Act

plans?

Yes, although some cases also involve post-ADEA amendments to the plans at issue.

a). EEOC v. City of Clearwater

b). EEOC v. Nebraska PERS

c). EEOC v. PERS of Ohio

d). EEOC v. Washington County

e). EEOC v. Easter Seal Society

f). EEOC v. Maryland National Park and Planning Commission

g). EEOC v. City of Mt. Lebanon

14. Do any of these cases involve challenges to seniority systems?

No.

15. It's my understanding that at least three courts of appeals have held that pre-Act plans were excluded from challenge under the ADEA. Is that correct? Was this then a well settled area of law prior to the Betts decision?

a). Correct.

b). The circuits were split:

Pre-ADEA Plans Exempted by Section 4(f)(2):

EEOC v. State of Maine, 644 F.Supp. 223, 226-27 (D.Me 1986), aff'd mem. opinion, 823 F.2d 542 (1st Cir. 1987).

EEOC v. County of Orange, 837 F.2d 420, 422 (9th Cir. 1988).

EEOC v. Cargill, Inc., 855 F.2d 682, 686 (10th Cir. 1988).

Pre-ADEA Plans Not Automatically Exempt Under Section

4(f)(2):

> Betts v. Hamilton County Board of Mental Retardation, 848 F.2d 692, 694 (6th Cir. 1988), rev'd sub nom. Public Retirement System of Ohio v. Betts, ___ U.S.___, 109 S. Ct. 2854 (1989).

16. What is your understanding of what the impact of Section 4(k) of this bill (S. 1511) would be on those plans? Specifically, would there be any liability for non-conformance prior to the enactment of this bill? Would parties to these plans, which have been in effect for more than 20 years, be required to conform as of the date of enactment? What if any relationship do you see between Section 4(k) of the bill dealing with pre-Act plans, and the retroactivity requirement of Section 5(b)?

The bill would be immediately effective on the date of enactment and employee benefit plans that were considered unlawful pre-Betts will likely be vulnerable to suit. Under new paragraph 4(k), present age discrimination pursuant to a bona fide employee benefit plan that is not justified by equal costs, or pursuant to a bona fide seniority system intended to evade the purposes of the Act, is actionable even if the benefit plan or seniority system was adopted before the effective date of the ADEA (i.e., 1967). Under section 5(b), the provisions of S. 1511 would be applicable to an age discrimination action or proceeding challenging present discrimination under such plan or seniority system if the action or proceeding was brought under the ADEA after June 23, 1989, or brought prior to June 23, 1989 and still pending on June 23, 1989. We are not addressing the constitutional problems which may be created by retroactive application of S. 1511 to actions which have already passed into final judgment. See McCullough v. Virginia, 172 U.S. 102, 123-24 (1898) ("It is not within the power of a legislature to take away rights which have been once vested by judgment."); Tonya K. v. Board of Educ. of Chicago, 847 F. 2d 1243, 1247-48 (7th Cir. 1988).

17. It is my understanding that the EEOC's Interpretive Bulletin provides for "safe harbors" based on group data? Could you explain how that works?

Section 1625.10(a)(1) of the Interpretive Bulletin provides that benefit levels to older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. Section 1625.10(d)(3) provides a way for employers to approximate costs without having to run the risk of litigation over whether the costs for older and younger workers are approximate equivalents.

The IB provides that employers may rely on cost data for groups of similarly situated employees. 29 C.F.R. section 1625.10(d)(1). It further provides that cost comparisons and adjustments under Section 4(f)(2) may be made on the basis of age brackets of up to five years. 29 C.F.R. section 1625.10(d)(3). The preamble to the IB noted that five-year bracketing to determine average costs was in accordance with longstanding insurance industry practice. 44 Fed. Reg. 30652 (May 25, 1979). These provisions of the EEOC's interpretive regulations would be unaffected by the proposed legislation.

18. Would employers be able to use actuarial tables under these two bills to cost justify their plans?

Yes. Neither S. 1511 nor S. 1293 should require a change in EEOC's position concerning the use of actuarial assumptions and tables in the computation of the costs of employee benefits. Under each of these bills, actuarial predictions could be used under section 4(f) to justify age distinctions. To the extent that the cost of benefits varies according to age and life span, employers would be able to use actuarial tables to justify the difference in cost.

19. The EEOC's testimony indicated that S. 1511 restores the EEOC's position that Section 4(f)(2) is an affirmative defense. Does that statement apply to both Section 4(f)(2)(A) and Section (4)(f)(2)(B) of this bill? Has the EEOC's position been uniformly upheld by the courts?

The EEOC is aware of no cases pre-Betts where these have not been viewed by the courts as affirmative defenses.

20. S. 1511 would explicitly place the burden on the employer not only with respect to Section 4(f)(2)(A) and (B) of that bill, but with respect to 4(f)(1) as well. Is application of the burden of proof to the employer under 4(f)(1) also consistent with they way the courts have applied that section of the current statute? Is it consistent with the Supreme Court's recent decisions in the civil rights area involving burden of proof questions?

Upon discussion with Senator Hatch's staff, we learned that a more detailed response than we originally anticipated was expected in answer to this question. In order to provide a considered response, yet not further delay submission of our entire package, the Commission's answer to this question will be submitted at a later date.

21. Could you detail the respective positions taken by the EEOC and the AARP in the Cipriano case before the Second Circuit?

The legal briefs of the EEOC and of the AARP in Cipriano v. City School District of North Tonawanda are attached.

QUESTIONS FROM SENATOR GRASSLEY

1. There is a kind of Alice in Wonderland quality about some of the discussion of Section 4(f)(2) which has occurred in the wake of the Betts decision. On the one hand, defenders of the Betts decision describe Section 4(f)(2) as "illogical, impractical and harmful to most employee". On the other hand, critics of the Betts decision argue that this provision represents the settled understanding which has governed employee benefit plans for twenty years.

Although there is not necessarily a contradiction between these points of view as I have stated them, the defenders of the EEOC Bulletin do seem to be asserting that Section 4(f)(2) of the Bulletin is widely adhered to by employers and that there is no great groundswell of opposition to them.

What is the EEOC view of this difference of opinion?

Is Section 4(f)(2) widely adhered to by employers?

Is there great discontent with them among employers? What evidence would you cite for your views on this?

Evidence available to the EEOC, including the number of charges received, suggests that employers have generally adhered to the requirements of the Interpretive Bulletin, and that, until recently (i.e., post-Betts), employers have been satisfied with the requirements of the Bulletin. Last year the EEOC issued two advance notices of proposed rulemaking to gather information about employers' and employees' experience under the Interpretive

Bulletin. The comments received in response from employers and employee representatives -- with the notable exception of Westinghouse Corporation -- generally expressed support for the basic provisions of the Interpretive Bulletin and only advocated changes of a technical nature to update it.

2. Critics of S. 1511 argue that it would prohibit "integration" or "coordination" of employee benefits. To what extent is "integration" of different employee benefits, such as severance pay and retirement pay, or disability pay and retirement pay, as in the Betts case, now common?

Would the bill prohibit such practices?

How would the "benefit package" provision of 4(f)(2) of the Bulletin bear on this question?

Simply stated, the integration issue is whether certain benefits, such as severance pay and pension payments or disability pay and retirement pay, should be considered a "single coordinated benefit" for purposes of the ADEA. Generally, as discussed more fully below, an employer's defense to certain ADEA benefit actions is facilitated if the employer's severance and pension benefits are viewed as providing one employee benefit. This determination has been made by courts on a case-by-case basis. The result has been that some courts have found severance and pensions "integrated," and some have not. For example, in Abenante v. Fulflex the United States District Court for the District of Rhode Island found that the severance and pension programs at issue before it "were part of a 'single coordinated benefit plan,'" but in EEOC v. Westinghouse and EEOC v. Borden's, Inc. the Third and Ninth Circuit Courts of Appeals, respectively, held that the separation and pension plans before them were separate and distinct benefit plans, and not part of a single coordinated plan. For the most part, the EEOC has argued that pensions are not a substitute for severance pay and that pensions and severance are distinct benefits. Generally, courts have found that the severance and pension programs in issue before them were not "integrated".

The integration theory arises within the context of sections 4(a) and 4(f)(2) of the ADEA. Section 4(a) broadly prohibits age discrimination by employers. Section 4(f)(2) of the ADEA has an employee benefit plan exception. Pre-Betts, this exception was relevant only where there was a showing of a *prima facie* violation of section 4(a). The party claiming the shelter of section 4(f)(2) had the burden of proving all the elements of the exception. Those elements were: 1) the existence of a "bona fide employee benefit plan"; 2) an action that "observe[d] the terms" of the plan and 3) the absence of subterfuge to evade the purposes of the Act.

Integration seems to have became an ADEA theory in response to court holdings that "bona fide employee benefit plans" include only those types of plans where the cost of benefits increases with age. These courts found that even though the language of section 4(f)(2) -- "such as a retirement, insurance or pension plan"-- was intended to be descriptive, the description has substance and limits the 4(f)(2) exemption to plans providing benefits based upon age-related cost factors.

Courts have rejected severance pay plans as independently protected plans because they provide a benefit unrelated to age/cost factors [and thereby are not bona fide employee benefit plans within the meaning of section 4(f)(2)]. In contrast, pensions plans are protected because they do provide such a benefit [and are specifically approved for the section 4(f)(2) exception]. Consequently, employers have argued that their pension and severance pay "plans" are, in fact, integrated parts of a single coordinated "pension-type" plan. This "integrated plan," according to the argument, generally provides benefits which cost more as age increases.

The Third Circuit Court of Appeals in EEOC v. Westinghouse, 725 F.2d 211 (3d Cir. 1983), and the Ninth Circuit Court of Appeals in EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984), rejected the "integration" argument, holding that the severance and pension benefits at issue were functionally independent, and that this independence established that the severance pay was not an integral part of the pension plan.[6] The courts gave little consideration to whether the discrimination in benefits was actually justified by age-related costs because this was generally considered a "subterfuge" question. The courts did not need to decide if the plans were a "subterfuge to evade the purposes of the Act" unless they first found that the plans were of the type eligible to utilize section 4(f)(2). Presumably, under the integration theory, if a court accepted that severance pay was an integral part of an employer's pension plan, and thus was "a bona fide employee benefit plan," the court would have to determine whether the plan was a "subterfuge to evade the purposes of the ADEA." If the court followed the IB, the court would decide the subterfuge issue by determining whether the employer had demonstrated that the discrimination resulted from greater cost for older worker benefits.

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[6] The Borden's court noted, however, that "a severance pay policy which is an integral part of a complex benefit scheme might be regarded differently." 724 F.2d at 1396.

If a court accepted the integration theory, it would affect the analysis under section 4(a) as well as under section 4(f)(2). Section 4(a) discrimination under a coordinated severance/pension plan might be determined by comparing the value of the younger employee's combined severance and pension benefit with the value of the older employee's combined severance and pension benefit. Absent "integration," section 4(a) discrimination is determined separately for pension and severance.

If section 4(a) discrimination existed, the employer could defend under section 4(f)(2) on the basis that the cost of the older worker's "integrated benefit" was equal to or exceeded the cost of the "integrated benefit" provide to the younger worker.

The benefit package approach under the IB is somewhat different from the integration theory. The IB provides that the cost of a benefit package can be used to determine whether an employer paid equal costs for older and younger employee benefits for purposes of the section 4(f)(2) exception, but that a benefit package cannot be used to determine whether the employer provided equal benefits under section 4(a)(1). In other words, the benefit package approach could be used to justify the discrimination [i.e., to establish absence of subterfuge under section 4(f)(2)] but could not be used to determine whether discrimination had occurred [an issue under section 4(a)(1)]. When determining whether the employer actually incurred equal cost on behalf of the older worker, the general rule under section 1625.10(f)(2) is that "[a] 'benefit package' approach to compliance under section 4(f)(2) offers greater flexibility than a benefit-by-benefit approach by permitting deviations from a benefit-by-benefit approach so long as the overall result is no lesser cost to the employer and no less favorable benefits for employees." Subsection (ii) of § 1625.10(f)(2) prohibits placing both pension and non-pension benefits in one benefit package ("A benefit package approach shall not apply to a retirement or pension plan.").

The benefit package approach was designed to allow employers and their employees the flexibility to develop mutually advantageous benefit packages, that is, older workers could continue to receive the same level of a certain fringe benefit particularly valuable to them, and employers could avoid higher benefit costs by reducing the level of some other benefit more than would otherwise be permissible. For example, if an employer has two employee benefit plans, one providing life insurance and the other long-term disability, and if age-based cost increases would permit a 10% reduction in each benefit and if both benefits cost the same to provide, the benefit package approach might permit the employer to provide the full amount of the life insurance while reducing the level of long term disability by 20%.

Pre-Betts guidelines placed the following limitations, among others, on benefit packaging: 1) the overall package could not be of lesser cost to the employer nor could the overall package provide less favorable overall benefits for employees; 2) the approach could not be applied to pension or health benefits and 3) the approach applied only to employee benefit plans that fall under section 4(f)(2). See, generally, 29 C.F.R. section 1625.10(f)(2). Note also that the guidelines provided a special type of benefit-by-benefit analysis for long-term disability benefits. 29 C.F.R. section 1625.10(f)(ii).

Theoretically, one could package benefits under wholly separate non-integrated plans. And, if the IB allowed an employer to package severance with pensions, an employer would not need to utilize the integration theory for purposes of establishing absence of subterfuge under section 4(f)(2) because it could seek to prove equal costs after placing severance and pensions in one "package." The employer might still seek, however, to utilize the integration theory to qualify for the section 4(f)(2) [i.e., to establish that it has the type of plan that qualifies for the 4(f)(2) exception because it is the type of plan where costs increase with age], or to defend under section 4(a) [i.e. to establish that when severance and pensions are considered together, the older employees received the greater benefit, and thus were not victims of discrimination].

If Congress codifies the Commission's benefit-by-benefit and benefit package approaches contained in 29 C.F.R. section 1625.10(c)(2) and (f), the issue of whether an employee's severance and pension benefits are in actuality parts of one coordinated benefit may be sufficiently fact-specific that "integration" will remain an open question under either S. 1293 or S. 1511. "Much uncertainty exist[ed pre-Betts] as to whether a plan [was] part of an integrated benefit scheme." Reinhart, Interpreting Section 4(f)(2) of the ADEA: Does Anyone Have a

"Plan"?, 135 UNIV. PA. L. REV. 1055, 1082 (1987).[7] See also EEOC v. Borden's, Inc., 724 F. 2d 1390, 1396 (9th Cir. 1984). That uncertainty would continue under either S. 1511 or S. 1293 -- neither discusses whether, or to what extent, severance pay and pensions can be considered to be one coordinated benefit.

3. As you probably know, critics of S. 1511 believe that the inability of employers to integrate certain types of benefits would result in increased costs to employers. In your view, would S. 1511 result in increased costs to employers?

If so, what would their reaction be?

The EEOC believes that most employers have complied with the Commission's Interpretive Bulletin and with the court decisions on integration. Accordingly, S. 1511 should impose little additional costs on employers.

4. Critics of Section 4(f)(2) argue that section does not really reflect current thinking at EEOC and cite the announcement in 1988 by EEOC that it was considering revisions to the section. I am referring to the July 15, 1988 announcement in the Federal Register. I believe that you did refer to this in your testimony. Did I understand you to say that the 1988 request for commentary applied only to voluntary early retirement and not to any other types of employee benefits?

No. There were two separate advance notices of proposed rulemaking issued: one on the IB, the other on early retirement incentives. As presently constituted, the Interpretive Bulletin has been in effect essentially unchanged since 1979. However, the ADEA has been amended several times since 1979, most notably in 1986 to lift the age-70 upper limit for coverage for most employees. Technical revisions to the IB would have been required for compatibility between the IB and the amendments.

5. Furthermore, they argue that EEOC has been inconsistent in interpreting the rule, citing the EEOC views in Cipriano to the effect that it was sufficient for the employer to "demonstrate a legitimate business reason" for age limitations with respect to early retirement incentive programs. How should we understand the EEOC views presented in Cipriano?

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[7] In his article, at page 1085, Mr. Reinhardt concluded that the question of integration will depend on the facts of each case and the weight given to each criterion by the deciding court.

In Cipriano, the EEOC argued that, "with very limited exceptions, there is only one legitimate reason for providing smaller benefits to older workers: the cost of providing the benefit increases because of age." [The IB permitted a few exceptions to the "equal cost" principle such as allowing employers to include Medicare in calculating health insurance coverage, and to cease pension benefit accruals at normal retirement age. 29 C.F.R. section 1625.10(f)(ii)(A)and (f)(iv)(A)[8]]. However, because early retirement incentives did not generally appear on the employment relations scene until well after the IB was issued, the Commission argued in Cipriano that the "equal cost" principle should not be automatically imposed as the exclusive test for proving the absence of "subterfuge" in such plans. As Vice Chairman Silberman testified:

> [S]ince 1979 there has been a proliferation of voluntary early retirement incentive plans. Such voluntary incentive plans were not at all common in 1979 because until the 1978 ADEA amendments, employers could lawfully retire employees involuntarily, solely on the basis of age (if pursuant to a bona fide plan), and under any circumstances at age 65. Thus, the Interpretive Bulletin did not contemplate voluntary retirement incentives.

In Cipriano, the EEOC took the position that the factor which distinguished certain early retirement incentive plans from other employee benefit plans, and which warranted an exception to the "equal cost" method for disproving "subterfuge," was the voluntary nature of employee participation in such plans. The EEOC's position was adopted by the District Court.

6. I would like you to comment on the distinction between a "safe harbor' and an "exclusive means" application of the "equal cost" rule of 4(f)(2). As I understand it, the court argued that the original version of the "equal cost" rule was not intended to be an exclusive way of escaping classification as a subterfuge. Can you elaborate on this distinction for me, and does EEOC have a position on this issue?

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[8] Congress has amended the ADEA since 1979 to disallow the Medicare exception and to prohibit cessation of pension benefit accruals or allocations because of age. The latter provision, section 4(i), provides detailed rules for pension plans with respect to accruals and allocations.

Shortly after the enactment of the ADEA in 1967, the Department of Labor, which originally administered the Act, issued an interpretation of Section 4(f)(2). That interpretation allowed employers to discriminate against older employees in the provision of benefits where the cost of such benefits was more expensive for older employees.

In 1978, Congress amended the ADEA to overrule the United States Supreme Court's decision in United Air Lines v. McMann. During congressional consideration of the amendment, there were numerous legislative comments about application of the section 4(f)(2) exception to various types of "employee benefit plans." Congress called for the Secretary of Labor to issue interpretive guidelines on the subject of "employee benefit plans."

In May 1979, the Department of Labor issued an Interpretive Bulletin on application of the Section 4(f)(2) exception to "employee benefit plans." The IB expanded in great detail upon guidelines which had been issued in 1969. The original guidelines stated, in part, that "[a] retirement, pension, or insurance plan will be considered in compliance with the statute where the actual amount of the payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of pension or retirement benefits, or insurance coverage." The original "equal-benefits-or-equal-cost" principle was apparently intended as a "safe harbor" rule for establishing the absence of any "subterfuge to evade the purposes of the ADEA." With certain exceptions, and consistent with legislative comments by the 1978 Congress, the new IB adopted the "equal-benefits-or-equal-cost" principle as the sole means of establishing the absence of "subterfuge."

Authority to administer and enforce the ADEA was transferred from the Secretary of Labor to the EEOC effective July 1, 1979. EEOC retained the IB on employee benefit plans.

In Betts, the EEOC and the Office of Solicitor General argued that the IB construction is consistent with the EEOC's interpretation of language of section 4(f)(2). That argument can be summarized as follows:

> The EEOC has taken the position that, in enacting 4(f)(2), Congress meant to shield employee benefit plans that disadvantaged older employees only where employers present reasonable economic justifications for doing so. The EEOC has interpreted the legislative history as supporting the

conclusion that employers must provide an economic justification before they may discriminate against older employees in the provision of an employee benefit. Senator Javits, who introduced the amendment that became section 4(f)(2), explained at the time he introduced it that it was intended to allow employers to provide different benefits to older employees "because of the often extremely high cost of providing certain types of benefits to older workers." Cong. Rec. 31,254-31,255 (1967). Since the EEOC has taken the position that the exception was intended to authorize employers to grant lesser benefits to older employees where benefits are more costly to provide to those employees, it is sensible to require employers to provide cost justification for their discrimination in order to invoke section 4(f)(2).

7. Some are concerned that enactment of S. 1511 would limit the scope of collective bargaining with respect to employee benefits. Are you able to say what the effect of S. 1511, if enacted, on the scope of collective bargaining of S. 1511 would be?

What would be the effect on currently in force collective bargaining agreements?

Does EEOC have a position on whether there should be an exception in the legislation for collectively bargained plans?

The EEOC believes that most collectively bargained agreements are in conformity with the EEOC's ADEA guidelines and thus in conformity with the requirements of S. 1511.

Employers and unions have never been permitted to waive individual rights under fair employment statutes, including the FLSA, Title VII, and the ADEA. As the Supreme Court stated with reference to Title VII rights, "the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII." Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

8. According to a letter to Senator Pryor and committee members from the Public Employees Retirement System of Ohio, some 35 states have benefit plans which integrate disability with retirement benefits, and have done so for decades. They argue that the retroactivity provisions of S. 1511 would seriously disrupt those programs, would raise potential past liability, and uncertainty as to how and when the plans could be redesigned. Can you comment on their concerns?

Are such concerns sufficiently valid, in your view, to suggest that the application to pre-ADEA plans should be reconsidered?

What about the fact that these are public plans developed through administrative and legislative processes of state governments? Should that have any bearing on whether S. 1511, if enacted, should apply to them?

We are not able to say precisely what impact S.1511 would have on state plans, but we would make a few general observations. First, as discussed above in the answer to question 2, the question of integration has been, and if S. 1511 is enacted will continue to be, decided on a case-by-case basis, considering whether the particular benefits at issue are really part of a single coordinated benefit. Second, the retroactivity provisions of S. 1511 must be viewed in conjunction with the ADEA's statute of limitations (two years in the case of a non-willful violation, three years if willfulness is proved) and time limits applicable to charges by private parties (180 or 300 days from the date of violation). Retroactive impact would be limited to the period covered by timely filed charges and suits. Third, in the Betts case, the state's plan denied disability retirement benefits completely to persons age 60 and above, and the state proffered no justification for this denial. The IB recognizes, however, that an employer may take into account the cost of providing disability benefits to older workers by reducing either the level or duration of such benefits to the extent justified by increasing age-related costs. See 44 Fed. Reg. 30654-55 (May 25, 1979) (preamble to IB). If S. 1511 is enacted, this defense would still be available to employers, including public employers.

The question of whether the legislation should extend to plans adopted before the enactment of the ADEA in 1967 is an issue that arises only because of the "subterfuge" language in section 4(f)(2). In United Airlines, Inc. V. McMann, 434 U.S. 192 (1977), the Supreme Court interpreted "subterfuge" as "a scheme, plan, stratagem, or artifice of evasion" and held that a plan established before 1967 could not be a subterfuge to evade a law not yet enacted. Although Congress expressed disagreement with this holding in the legislative history of the 1978 ADEA amendments, the pertinent provision of the ADEA was not amended at that time. For this reason, the Supreme Court in Betts retained the McMann definition of subterfuge, thus exempting pre-Act plans. S. 1511 eliminates the "subterfuge" language from section 4(f)(2) and specifically provides for application of the law to all plans regardless of the date of their adoption. We believe that the ADEA should apply to pre- and post- Act plans alike.

With respect to the fact that these are public employer plans, Congress extended the ADEA in 1974 to cover state and local government employees. The Supreme Court in EEOC v. Wyoming, 460 U.S. 226 (1983), upheld the constitutionality of application of the ADEA to states and localities. Since the protections of the ADEA apply generally to state and local employees in the same manner as in the private sector, it may be difficult to justify a different rule for employee benefit plans of state and local governments.

9. Would private plans in force prior to enactment of the Age Discrimination in Employment Act also experience disruption comparable to that Ohio claims it and the 35 other states would experience?

Do you have any idea how many private plans would be affected by this provision?

No. Based on charges filed with EEOC, it appears that most plans are in compliance with the Interpretive Bulletin. In addition, EEOC printed an Advance Notice of Proposed Rulemaking in the Federal Register in 1988 seeking comments on employee benefit plans under the ADEA. Most comments in the employer community favored retaining EEOC's interpretation concerning benefits and benefit plans. From this information, it seems that most private plans are in compliance with the pre-Betts interpretation.

10. In testimony last week on this matter before committees of the House of Representatives, it was stated that ERISA already provides extensive protections for employee benefits. Are you able to comment on the relationship of benefit plan protections for employees in ERISA to the Age Discrimination in Employment Act protections we are discussing today?

ERISA does not generally deal with issues of age discrimination in employee benefit plans, while the ADEA provides very specific protections to older workers. The legislative history of the ADEA demonstrates a clear Congressional intent that ERISA and the ADEA be read harmoniously. Thus, benefit plan protections for employees in ERISA would not be affected by the proposed legislation just as the ADEA's protections against age discrimination are not superseded by ERISA.

AARP

The Honorable David Pryor
Chairman, Special Committee on Aging

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Committee on Labor and Human Resources

United States Senate
Washington, D.C. 20510

Dear Chairman Pryor and Chairman Metzenbaum:

On behalf of the American Association of Retired Persons (AARP), I want to thank you for the opportunity to present AARP's position in support of the Older Workers' Benefit Protection Act (S. 1511) before the joint hearing on September 27, 1989.

I am enclosing responses to the questions asked by you, as well as by Senator Jeffords and Senator Grassley, for inclusion in the record of this hearing.

AARP believes that swift enactment of this legislation is critical to protect the rights of older workers to fair treatment in employee benefits. I look forward to working with you on this important legislation. Please do not hesitate to call Michele Pollak, of AARP's Federal Affairs staff if you need any additional information.

Sincerely,

Horace B Deets

Horace B. Deets

Enc.

American Association of Retired Persons 1909 K Street, N.W., Washington, D.C. 20049 (202) 872-4700
Louise D. Crooks *President* Horace B. Deets *Executive Director*

QUESTIONS FROM SENATOR PRYOR

GENERAL

1. Q: Does the legislative history of ADEA and section §4(f)(2) suggest that Congress intended to sanction age discrimination in the area of employee benefits?

A: No. The legislative history of the ADEA, and of §4(f)(2) in particular, repeatedly and clearly states that Congress intended to prohibit age discrimination in all forms of employee benefits, except where the cost of the benefit increased with the age of the employee. This is found in the debates during the passage of the ADEA in 1967, see e.g., Hearings on S. 830 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 27 (1967); 113 Cong. Rec. 7076 (March 16, 1967) (remarks of Sen. Javits).

It was repeated when amendments to ADEA §4(f)(2) were passed in 1978 and the "equal benefit or equal cost" principle expressed in the IB was discussed by an approving Congress. See 124 Cong. Rec. 8218 (March 23, 1978) (remarks of Sen. Javits); Id. at 34295 (Oct. 19, 1977) (remarks of Sen. Williams). See also 124 Cong. Rec. 7887 (March 21, 1978) (remarks of Rep. Weiss: "[I]t is not the intention of this amendment to have older workers cut off from their health and benefit plans the day their reach age 65 . . . [employers] should not interpret the 1977 [1978] amendments to the ADEA as a license to cease to provide reasonable benefits to their older employees."); Id. at 7881 (March 21, 1978 (remarks of Rep. Hawkins).

2. Q: Why do you believe that the "equal benefit or equal cost" regulation is the correct test for the §4(f)(2) exception?

A: The "equal benefit or equal cost" principle has long been accepted as the correct test for proving the § §4(f)(2) defense for a number of reasons:

- It reflects the cost considerations of most concern to employers, and which were discussed by Congress in 1967 and 1978; (see answer to Sen. Pryor's question #1, above).

- It is an objective, non-arbitrary test. The employer's costs for the benefit determine whether he meets the standards for the defense. Motivation and intent are irrelevant.

  In contrast, other tests (e.g., "legitimate business reason;" "business necessity") are subjective and depend upon varying and speculative interpretations of an employer's motivation and/or intent. In this respect, such tests are difficult for employers to satisfy -- and difficult for employees to rebut.

- It is easy and inexpensive for an employer to produce the evidence necessary for the defense; (s)he need only supply the cost data for the benefits in question.

3. Q: Do you believe that S. 1511 accomplishes the goal of returning this area of the ADEA to the status quo before Betts?

A: Yes. The language of S. 1511 accurately reflects the "equal benefit on equal cost" principle of the IB.

4. Q: Does S. 1511 settle any old disputes or create any new ones in this area of the law?

A: No. It does neither. Because S. 1511 so closely tracks the IB, it does not settle any disputes that existed under prior law, or create any new disputes.

5. Q: Do you believe that employers will stop offering employee benefit plans if S. 1511 becomes law?

A: No. The overwhelming majority of employers have been complying with the "equal benefit or equal cost" principle expressed in S. 1511 in the construction of their employee benefit plans for 20 years. For these employers, S. 1511 will not even require any changes in their current employee benefit plans.

The broad general compliance with the IB indicates that employers will not eliminate benefits if forced to comply with the equal benefit or equal cost rule, including its prohibition against offsetting benefits against pension benefits. Employers can and have controlled benefit costs through the use of a wide range of non-discriminatory legal measures.

The present opposition to the "equal benefit or equal cost" principle and the IB generally is a very new occurrence, and clearly reflects a desire to use this legislation to make legal certain practices that were clearly illegal prior to Betts. S. 1511 must not be used for this purpose.

Employer support for the IB was expressed in strong terms as recently as last year, in response to an EEOC Advanced Notice of Proposed Rulemaking on Employee Benefit Plans, 53 Fed. Reg. 26789 (July 15, 1989). The EEOC specifically asked for public opinion on whether the IB should be altered. The Equal Employment Advisory Council, the American Council of Life Insurance, and the Association of American Railroads were among the employers and employer organizations that urged the EEOC to retain the IB in its present form (all comments were filed with the EEOC in October 1988).

QUESTIONS FOR MR. DEETS

1. Q: I assume that AARP is involved in a number of age discrimination cases involving employee benefits. How many cases that you know of at the moment have been or could be adversely affected by the Betts decision?

A: AARP is presently involved in three cases that are directly and adversely affected by Betts. In order to avoid dismissal of these cases, AARP has has filed Motions to Stay the Proceedings pending the outcome of this legislation. It is unclear whether AARP's motions will be granted.

AARP is assisting with or monitoring several other cases brought by private individuals that are directly and adversely affected by Betts. We have recommended to those parties that they also file Motions to Stay the proceedings.

The case brought by Mr. Harold Sousa (who testified at the joint Senate Aging/Labor hearing on September 27, 1989) was dismissed on September 25, 1989, because of Betts.

AARP understands that the EEOC has at least 25-30 pending cases that are directly and adversely affected by Betts.

AARP assumes that there are many cases of which it is presently unaware that are directly and adversely affected by Betts.

2. Q: Can a bill which does not contain a retroactivity provision completely address the Betts problem?

A: S. 1511 does not have any "retroactive" effect. Section 5(b) of S. 1511 simply preserves the claims of employees who already had a charge or complaint of benefits discrimination pending on the date Betts was decided, or filed such a charge or complaint after Betts was decided. Since this legislation reflects Congress' belief that Betts, was wrongly decided, fundamental fairness requires protection of the rights of those employees who had charges pending at the time Betts was decided. Many of these timely and otherwise meritorious claims may have been or will be dismissed because of Betts.

S. 1511 is not retroactive because it does not revive the claims of employees who failed to file a charge or complaint within the applicable statutory period. In this respect, the bill unfortunately does not protect the rights of employees who were discouraged from filing a timely charge or complaint of benefits discrimination after Betts.

Preservation of these claims works is not unfair to employers. This legislation restores prior law and long-standing, well-known and commonly-accepted interpretations of ADEA §4(f)(2). If you permit employers who were violating the law prior to Betts to escape liability solely because of Betts, you will be rewarding those who have been discriminating the longest and most egregiously.

Employees who may be victims of discrimination and who asserted their claims in a timely fashion should not be penalized by an accident of timing and a wrongly-decided Supreme Court decision.

3. Q: What is AARP's position on the issue of early retirement incentive plans?

A: AARP believes that early retirement incentive programs, exit incentive programs, and other enhanced benefit downsizing programs can be beneficial to employers and employees. These programs are not per se illegal under ADEA; nor should they be prohibited.

However, like every employment practice, these programs must comply with the ADEA and other labor laws. And, like all employee benefit programs, discriminatory early retirement incentive programs must satisfy the "equal benefit or equal cost" rule in order to escape liability under the ADEA.

AARP believes that the overwhelming majority of early retirement incentive programs satisfy the requirements of the ADEA. However, two types of programs are of particular concern to AARP:

- exit incentives offered only to older workers, particularly when participation is involuntary, e.g., coercing older workers into accepting early retirement; and
- one-time exit incentives offered only to younger workers and denied to older workers, e.g., offering an exit incentive only to employees age 55-60.

S. 1511 does not change prior law on these issues.

4. Q: What is AARP's position on offsetting severance pay with pension benefits for pension eligible employees?

A: Prior to Betts, the law was clear that denying, reducing or offsetting severance pay to older workers who are eligible for a pension violated the ADEA and was prohibited by the IB. See 29 C.F.R. §1625.10(f)(2)(ii). Every Administration since the passage of the ADEA, and every Court of Appeals to address this issue, has agreed that the denial of severance pay to retirement- eligible employees violates the ADEA. See EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3rd Cir. 1989); EEOC

v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984).

The denial of severance pay has a number of adverse, discriminatory effects on older workers:

- Denial of severance pay to a retirement-eligible employee in the event of an involuntary layoff, termination or plant closing forces that employee to retire in order to get any termination benefits - regardless of whether the employee intended to retire. This constitutes involuntary retirement in violation of the ADEA.

- The pension benefit received by an older worker who is forced into retirement earlier than anticipated is likely to be significantly reduced. Pension benefits are "actuarially reduced" for each year benefits are received prior to "normal retirement age" (usually age 65).

  The denial of severance pay means that older workers rarely can afford to wait until "normal retirement age" to begin receiving pension benefits.

- The reduced pension benefit may force an older worker to begin receiving Social Security benefits much earlier than expected, resulting in a reduced Social Security benefit. This is not only bad for the employee, but increases the burdens upon the Social Security system, as well.

- In sharp contrast to the reduced pension benefit an older worker may be forced to accept, a young employee receiving severance pay will still receive 100% of his vested pension benefit from the same employer, upon reaching normal retirement age. In addition, younger workers have a greater opportunity to work for a second employer for a sufficient number of years to earn a second pension benefit.

The testimony of Harold Sousa at the joint Senate hearing on September 27, 1989, provides a graphic example of the losses suffered by older workers who are denied or receive reduced severance benefits.

The Congressional Research Service has concluded that the denial of severance pay to retirement eligible employees is not only discriminatory, but was prohibited under the law prior to Betts. See Legislation Reversing the Betts Decision and Its Impact on Employee Benefit Plans, Congressional Research Service (C. Merck, R. Schmitt) to Senate Special Committee on Aging (September 25, 1989), at p. 6 ("Employer organizations are seeking legislation that would not return to the pre-Betts rules against including pension benefits in an integrated benefit plan." (emphasis original)).

QUESTIONS FROM SENATOR METZENBAUM

1. Q: The EEOC spells out its "benefit package" approach in the IB at section §1625.10(f)(iii). What are the key factors or restrictions in that approach?

A: Generally, employers must meet the "equal benefit or equal cost" requirement for each benefit provided. Employers may not aggregate benefits so as to deny older workers certain benefits, e.g., cannot increase life insurance at the expense of health insurance.

However, the IB permitted an employer to utilize a "benefit package" in limited circumstances if the purpose was to benefit older workers. The IB permitted benefit packages with the following restrictions:

- a benefit package could not be used to reduce overall benefits or benefit costs;
- pension and retirement benefits could not be included in the package (i.e., no offsetting any other benefits against pensions);
- health benefits could not be reduced more than they would be if they were considered separately (pursuant to the benefit-by-benefit approach);
- if any benefit (other than health) was reduced by more than it would be if it was considered separately (under the benefit-by-benefit approach), the employer must provide an additional benefit to offset the loss.

An example of a legal benefit package is a severance package offered at a plant closing, in which the employer provides all employees with the following options:

- cash severance to workers not eligible or opting for retirement, or
- health insurance of equal value to the cash severance to workers who opt to retire.

2. Q: You heard the testimony from Mr. Sousa, who described how the present value of his pension was deducted from his severance pay. Was that lawful under the ADEA before Betts? Should it be?

A: Harry Sousa and his co-workers were penalized for working longer and being older. Prior law prohibited this, and it is bad policy.

Prior to Betts, the law was clear that denying, reducing or offsetting severance pay to older workers eligible for a pension violated the ADEA and was prohibited by the IB. See 29 C.F.R. §1625.10(f)(2)(ii). Every Administration since the passage of the ADEA, and every Court of Appeals to address this issue, has agreed that the denial of severance pay to retirement-eligible employees violates the ADEA. See EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3rd Cir. 1989); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC. v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984).

The denial of severance pay has a number of adverse, discriminatory effects on older workers:

- Denial of severance pay to a retirement-eligible employee in the event of an involuntary layoff, termination or plant closing forces that employee to retire in order to get any termination benefits - regardless of whether the employee intended to retire. This constitutes involuntary retirement in violation of the ADEA.
- The pension benefit received by an older worker who is forced into retirement earlier than anticipated is likely to be significantly reduced. Pension benefits are "actuarially reduced" for each year benefits are received prior to "normal retirement age" (usually age 65).

  The denial of severance pay means that older workers rarely can afford to wait until "normal retirement age" to begin receiving pension benefits.
- The reduced pension benefit may force an older worker to begin receiving Social Security benefits at a much earlier age than expected - resulting in a reduced Social Security benefit.
- In sharp contrast to the reduced pension benefit an older worker may be forced to accept, a young employee receiving severance pay will still receive 100% of his vested pension benefit from the same employer, upon reaching normal retirement age. In addition, younger workers have a greater opportunity to work for a second employer for a sufficient number of years to earn a second pension benefit.

The Congressional Research Service has concluded that the denial of severance pay to retirement eligible employees is not only discriminatory, but that it was prohibited under the law prior to Betts. See Legislation Reversing the Betts Decision and Its Impact on Employee Benefit Plans, Congressional Research Service (C. Merck, R. Schmitt) to Senate Special Committee on Aging (September 25, 1989), at p. 6 ("Employer organizations are seeking legislation that would not return to the pre-Betts rules against including pension benefits in an integrated benefit plan." (emphasis original)).

3. Q: You list a series of early retirement or exit incentive programs that would be lawful under the ADEA before Betts. Is there any common theme to these? Some critics suggest that a retirement incentive must have an upper age limit because otherwise it would be little more than a retirement bonus and the employer would not use it. Is there any empirical data regarding the prevalence or success of programs that do not have an upper age limit?

A: The primary characteristics of early retirement and exit incentives that are legal under the ADEA are:

- they are voluntary - no one is coerced into leaving;
- Older workers are offered the benefit on an equal basis;
- The benefit is not reduced as an employee's age increases, unless the cost of the benefit increases with age.

AARP believes that the overwhelming majority of exit and early retirement incentives meet these criteria and are legal.

S. 1511 would not change the law in this regard.

QUESTIONS FROM SENATOR JEFFORDS

1. Q: The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

A: The regulations (Interpretive Bulletin, or "IB") at 29 C.F.R. §1625.10 permitted the use of commonly-accepted actuarial practices in the computation of employee benefits and employers benefit costs under §4(f)(2). Specifically, §1625.10(d)(3) provided for the use of cost comparisons and adjustments made on the basis of age brackets of up to five years, (which is the most common basis for computing benefits and costs).

AARP is unable to speak to the EEOC's future position on this issue. However, the EEOC has consistently supported the use of commonly-accepted actuarial assumptions and tables as provided in the IB, and has given no indication that it is dissatisfied with, or is contemplating any changes in, the use of such assumptions and tables.

AARP does not oppose the use of commonly-accepted actuarial assumptions and tables for these purposes and does not believe that S. 1511 would prohibit or alter their present use. To the contrary, the specific reference in the legislation to the regulations at 29 C.F.R. §1625.10 should be interpreted as Congressional approval of their use.

2. Q: Do you believe that the retroactive application of S. 1511 will have any impact on the statute of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

A: S. 1511 does not have any "retroactive" effect. Section 5(b) of S. 1511 simply preserves the claims of employees who already had a charge or complaint of benefits discrimination pending on the date Betts was decided, or filed such a charge or complaint after Betts was decided. Since this legislation reflects Congress' belief that *Betts* was wrongly decided, fundamental fairness requires protection of the rights of those employees who had charges pending at the time *Betts* was decided. Many of these timely and otherwise meritorious claims may have been or will be dismissed because of *Betts*.

S. 1511 is not retroactive because it does not revive the claims of employees who failed to file a charge or complaint within the applicable statutory period. In this respect, the bill unfortunately does not protect the rights of employees who were discouraged from filing a timely charge or complaint of benefits discrimination after Betts.

Preservation of these claims works is not unfair to employers. This legislation restores prior law and long-standing, well-known and commonly-accepted interpretations of ADEA §4(f)(2). If you permit employers who were violating the law prior to Betts to escape liability solely because of Betts, you will be rewarding those who have been discriminating the longest and most egregiously.

Employees who may be victims of discrimination and who asserted their claims in a timely fashion should not be penalized by an accident of timing and a wrongly-decided Supreme Court decision.

3. Q: Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

A: AARP has no independent empirical evidence, and no reason to believe, that a substantial number of benefit plans were in non-compliance with the IB prior to Betts. To the contrary, AARP believes that the overwhelming majority of employers obey the law and have policies and benefit plans that comply with the ADEA and the long-standing IB.

As recently as last year, the business community expressed strong support for the IB as a workable and reasonable interpretation of the defense provided in ADEA §4(f)(2). See EEOC Advance Notice of Proposed Rulemaking on Employee Benefit Plans, 53 Fed. Reg. 26789 (July 15, 1989), Comments filed by the Equal Employment Advisory Committee; American Council of Life Insurance; American Association of Railroads (all filed October 1988).

Questions have been raised regarding the benefits practices of some state and local governments, who, because they are exempt from compliance with ERISA, fail to ensure that their benefit plans are in compliance with the ADEA (from which they are not exempt). For example, the disability plan for public employees in Ohio that was at issue in Betts clearly violated the ADEA as it was interpreted prior to Betts. AARP has no independent information as to which or how many state and local benefit plans are or are not in compliance with the ADEA. AARP believes, however, that most employers, public and private, comply with the law.

4. Q: Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

A: AARP knows of no company that has terminated a severance pay or any other benefit plan because of the long-standing prohibition against "integrating," or offsetting these benefits with or against their pension plans - and believes it is unlikely that any company would do so. The fact that, for 20 years, most employers have complied with the IB and its strict prohibition against "integration" or offsetting against pensions indicates that it is not a common practice.

Both economic and personnel considerations would militate against terminating a benefit plan. Employers choose to provide benefits for many reasons, chief among them to enhance the compensation of their employees. It makes little sense to withdraw benefits rather than simply controlling benefit costs through nondiscriminatory measures.

5. Q: In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills?

A: This legislation simply restores prior law with regard to employee benefits under the ADEA. Therefore, employers who were previously complying with the law - which AARP believes to be the overwhelming majority of employers - will not have to make any changes in their benefit plans upon the passage of this legislation. The testimony of UNUM at the Senate joint Aging & Labor hearing on September 27, 1989, and of Ellen Fredel at the House joint hearing on September 21, 1989, reinforce AARP's position.

6. Q: Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

A: The regulations at 29 C.F.R. §1625.10 were entirely consistent with ERISA, the Internal Revenue Code and other laws. Therefore, S. 1511 is consistent with ERISA, the Internal Revenue Code and other laws. In particular, S. 1511 reinforces the prohibitions contained in ERISA, the Internal Revenue Code and the ADEA (§4(i)) that prohibit age discrimination in pension plans.

The ADEA does impose additional obligations upon employers not imposed by ERISA, the Internal Revenue Code or other laws: to not discriminate on the basis of age. However, the compatibility of the ADEA with other laws regulating benefit plans has been proven by employers' general compliance with the IB for more than 20 years prior to Betts.

7. Q: In the normal sequence of events, assuming the continued

existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?

A: The denial or reduction of severance pay to retirement-eligible employees effectively penalizes those employees for being long-term, loyal --but older-- workers.

AARP agrees that, when an employer denies a retirement-eligible employee severance pay in the event of an involuntary layoff, termination or plant closing, that employee is in effect forced to retire in order to have any income at all. It is for this and other reasons that the IB, the courts and the EEOC have consistently held that the denial of severance pay to retirement-eligible employees violates the ADEA.

The Congressional Research Service has concluded that the denial of severance pay to retirement eligible employees is not only discriminatory, but was prohibited under the law prior to *Betts*. *See Legislation Reversing the Betts Decision and Its Impact on Employee Benefit Plans*, Congressional Research Service (C. Merck, R. Schmitt) to Senate Special Committee on Aging (September 25, 1989), at p. 6 ("Employer organizations are seeking legislation that would *not* return to the pre-*Betts* rules against including pension benefits in an integrated benefit plan." (emphasis original)).

The denial of severance pay has a number of other adverse, discriminatory effects on older workers:

- First, the pension benefit received by the older worker who is forced into retirement earlier than anticipated is likely to be significantly reduced. Pension benefits are "actuarially reduced" for each year benefits are received prior to "normal retirement age" (usually age 65). The denial of severance pay means that older workers rarely can afford to wait until "normal retirement age" to begin receiving pension benefits.
- Second, the reduced pension benefit may force an older worker to begin receiving Social Security benefits at a much earlier age than expected - resulting in a reduced Social Security benefit.
- Third, in sharp contrast to the reduced pension benefit an older worker may be forced to accept, *a young employee*

receiving severance pay will still receive 100% of his vested pension benefit from the same employer, upon reaching normal retirement age. In addition, younger workers have a greater opportunity to work for a second employer for a sufficient number of years to earn a second pension benefit.

The testimony of Harold Sousa at the joint Senate Labor and Aging Committee hearing on September 27, 1989, provides a graphic example of the losses suffered by older workers who are denied, or receive reduced severance benefits.

8. Q: A number of witnesses stated at the hearing that the real issue involved with this legislation is whether the ADEA should prohibit integration of severance pay with pensions, and the policy questions surrounding that determination. Do you agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answers in detail.

A: AARP believes that the sole purpose of S. 1511, as described in the preamble to the bill and in the floor statements of the sponsors, is to reaffirm the ADEA's prohibition against benefits discrimination and restore the law's interpretation as it was understood prior to Betts. See 29 C.F.R. §1625.10.

The issue of whether the ADEA prohibits "integration" or offsetting of severance pay or any benefit against pension benefits was settled 20 years ago, with the issuance of the IB. See 29 C.F.R. §1625.10(f)(2)(ii). Since that time, every Administration and every Court of Appeals to address the issue has agreed that the ADEA prohibits the denial or reduction of severance benefits to older workers based on pension eligibility, or the value of their pension. See EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3rd Cir. 1989); EEOC v. Westinghouse Electric Corp., 725 F.2d 211 (3rd Cir. 1983), cert. denied, 469 U.S. 820 (1984); EEOC. v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984).

As noted above, in my answer to question #7, the Congressional Research Service has concluded that efforts by opponents of this legislation to reopen this issue represent an attempt to change settled prior law.

QUESTIONS FROM SENATOR GRASSLEY

1. Q: There is a kind of Alice in Wonderland quality about some of the discussion of §4(f)(2) which has occurred in the wake of the Betts decision. On the one hand, defenders of the Betts decision describe §4(f)(2) as "illogical, impractical, and harmful to most employees". On the other hand, critics of the Betts decision argue that this provision represents the settled understanding which has governed employee benefit plans for twenty years.

Although there is not necessarily a contradiction between these points of view as I have stated them, the defenders of the EEOC Bulletin do seem to be asserting that §4(f)(2) of the Bulletin is widely adhered to by employers and that there is no great groundswell of opposition to them.

What is the AARP view of this difference of opinion?

Is §4(f)(2) widely adhered to by employers?

Is there great discontent with them among employers? What evidence would you cite for your views on this?

A: The present opposition to the "equal benefit or equal cost" principle and the IB generally is a very new occurrence, and reflects a desire to use this legislation to make legal certain practices that were clearly illegal prior to Betts. S. 1511 must not be used for this purpose.

Employer support for the IB was expressed in strong terms as recently as last year, in response to an EEOC Advanced Notice of Proposed Rulemaking on Employee Benefit Plans, 53 Fed. Reg. 26789 (July 15, 1989). The EEOC specifically asked for public comment on whether the IB should be altered. In response, the comments (filed Oct. 12, 1988) of the Equal Employment Advisory Council (whose membership comprises a substantial cross-section of employers and trade associations) stated that:

> [N]either case law nor Congressional action justify revision of those portions of the IB which were not affected by ADEA amendments [in 1982, regarding health insurance, and in 1986, eliminating mandatory retirement]. . . . The existing IB . . . has received the approval of Congress and the courts, and therefore should not be altered. (pp. 1-2)

The comments of the American Council of Life Insurance (filed Oct. 18, 1988) were similar:

> [T]here is no reason for the Commission to consider revision of those portions of the Bulletin which were not affected by new legislation [in 1982 and 1986]. Neither the present case law nor activity by Congress justifies changes to these sections. . . . [T]he Interpretive

> Bulletin has received the approval of the courts and Congress and therefore should not be altered. (p.1)

See also Comments of the Association of American Railroads, filed October 14, 1988, at p.10.

It was therefore surprising to read in the Statement of Douglas McDowell, attorney for the Equal Employment Advisory Council, to the Senate Labor Subcommittee and Senate Aging Committee on September 27, 1989, that "Employers generally do not accept the EEOC's interpretation" regarding the benefit package approach in the IB (p. 14). Less than one year earlier, the Equal Employment Advisory Council had commented to the EEOC that "[T]he present benefit package approach is adequate and . . . useful to employers in complying with the ADEA." (p. 4)

The almost universal acceptance of the "equal benefit or equal cost" principle expressed in the IB resulted from the practical and economic appeal of the test for employers:

- It reflects the cost considerations of greatest concern to employers;
- It is an objective, non-arbitrary test. The employers costs for the benefit determine whether he meets the standards for the defense. Motivation and intent - which are subjective, speculative and difficult to prove or rebut - are irrelevant to the test.
- It is easy and inexpensive for an employer to produce the evidence necessary for the defense; (s)he need only supply the cost data for the benefits in question.

2. Q: Critics of S. 1511 argue that it would prohibit "integration" or "coordination" of employee benefits. To what extent is "integration" of different employee benefits, such as severance pay and retirement pay, or disability pay and retirement pay, as in the Betts case, now common?

Would the bill prohibit such practices?

How would the "benefit package" provisions of §4(f)(2) of the Bulletin bear on this question?

A: S. 1511 would prohibit -- and permit -- "integration" of different employee benefits to the same degree that it was prohibited -- and permitted -- by the IB prior to Betts. S. 1511 adds no language to the ADEA regarding "integration" beyond that which was contained in the IB.

"Integration" of benefits under the IB was permitted through use of the benefit package approach which, as discussed above in Senator Grassley's question #1, was supported by employers. The IB imposed some restrictions on the use of the benefit package approach. Employers generally have had no difficulty in complying with these restrictions, found at 29 C.F.R. §1625.10(f)(2):

- pension and retirement benefits could not be included in the package (i.e., no offsetting of pensions against other benefits);
- the benefit package could not be used to reduce overall benefits or benefit costs;
- health benefits could not reduced more than they would be if they were considered separately;
- if any benefit (other than health) was reduced more than it would be if it were considered separately, the employer must provide another benefit to offset the loss.

There were good reasons for the IB's prohibition against integrating pension or retirement benefits into a benefit package:

- unlike most benefits, pension benefits increase in value with the increasing age (and service) of the employee. Thus, if employers were permitted to offset or integrate benefits against the value of a pension benefit, older workers could get increasingly less of all other benefits as they aged.
- unlike other benefits, pension benefits become a vested, legal right. Federal law (ERISA) prohibits the reduction or denial of a vested pension benefit; pension benefits cannot be reduced or denied based on the value of any other benefit.

AARP has no information regarding how frequently employers utilize the benefit package approach to "integrate" benefits, either legally (in compliance with the above restrictions) or illegally. However, because most employers construct benefit plans in compliance with the ADEA, AARP believes that most employers who utilize benefit packages do so pursuant to the IB.

The Congressional Research Service has concluded not only that denying or reducing a benefit (such as severance) to an older worker based on pension eligibility is discriminatory, but that employers who seek to permit this are trying to change prior law on this issue. See Legislation Reversing the Betts Decision and Its Impact on Employee Benefit Plans, Congressional Research Service (C. Merck, R. Schmitt) to Senate Special Committee on Aging (September 25, 1989), at p. 6 ("Employer organizations are seeking legislation that would not return to the pre-*Betts* rules against including pension benefits in an integrated benefit plan." (emphasis original)).

3. Q: As you probably know, critics of S. 1511 believe that the inability of employers to integrate certain types of benefits would result in increased costs to employers. In your view, would S. 1511 result in increased costs to employers?

If so, what would their likely reaction be?

A: *Most employers will not have to make any changes in their benefit plans if S. 1511 is passed.* The overwhelming majority of employers complied with the IB prior to *Betts*, *see* answer to Sen. Grassley's question #2, above.

Since S. 1511 would permit employers to "integrate" benefits to the same extent that "integration" was permitted under the IB prior to *Betts*, most employers will not incur any additional costs.

Employers who maintained discriminatory plans prior to *Betts* will be under the same obligation under S. 1511 as they were under the IB: to revise those plans to comply with the ADEA. The fact that compliance may cause an employer to incur certain costs has, of course, never been a defense to discrimination under any civil rights law, including the ADEA.

The broad general compliance with the IB indicates that employers will not eliminate benefits if forced to comply with the equal benefit or equal cost rule, including its prohibition against offsetting benefits against pension benefits. Employers can and have controlled benefit costs through the use of a wide range of non-discriminatory legal measures.

4. Q: I would like to comment on the distinction between a "Safe Harbor" and an "Exclusive Means" application of the "Equal Cost" rule of §4(f)(2). As I understand it, the court argued that the original version of the "Equal Cost" rule was not intended to be an exclusive way of escaping classification as a subterfuge.

Can you elaborate on this distinction for me, and does AARP have a position on this issue?

A: Since 1969, compliance with the "equal benefit or equal cost" principle expressed in the IB was the "exclusive means" for an employer to satisfy the requirements of §4(f)(2) in defense of a charge of *benefits discrimination*. It was the only acceptable *"safe harbor"* for reducing benefits for older workers. *See EEOC* v. *City of Mt. Lebanon*, 842 F.2d 1480 (3rd Cir. 1988); *Karlen* v. *City Colleges of Chicago*, 837 F.2d 314 (7th Cir.), *cert. denied*, 108 S. Ct. 2038 1988).

(Prior to 1978, §4(f)(2) was also used as a defense to allegations of involuntary retirement (as opposed to allegations of benefits discrimination). An employer argued that an employee could be forced to retire earlier than age 65 pursuant to the "normal retirement age" contained in a "bona fide employee benefit plan" such as a pension plan. See United Air Lines v. McMann, 343 U.S. 192 (1977). In 1978, Congress amended the ADEA to prohibit the use of the §4(f)(2) defense in this manner and specifically reiterated its support for the "equal benefit or equal cost" rule as the only recognized defense to a charge of benefits discrimination.)

Prior to Betts, the only suggestion that the IB was not the exclusive "safe harbor" was contained in a "friend of the court" brief filed by the EEOC in the district court proceedings in Cipriano v. Bd. of Ed. of No. Tonowanda, 700 F.Supp. 1199 (W.D. N.Y. 1988). In this brief, the EEOC for the first time departed from its own regulations to suggest that, in certain very limited circumstances, the IB might not be the exclusive defense under §4(f)(2). However, the court in Cipriano found that program discriminatory as to the plaintiffs (who were refused the early retirement benefit because of their age). And, the EEOC took a completely different position in a similar case in which it is a party (in which older workers were refused an early retirement benefit because of their age), EEOC v. City Colleges of Chicago, No. 88 C 10726 (N.D. Ill.). Thus, the EEOC's amicus brief in Cipriano cannot be read as accomplishing the dramatic change in policy that the EEOC - and certain members of the business community - argue that it is.

5. Q: Some are concerned that enactment of S. 1511 would limit the scope of collective bargaining with respect to employee benefits.

Are you able to say what the effect of S. 1511, if enacted, on the scope of collective bargaining of S. 1511 would be?

What would be the effect on currently in-force collective bargaining agreements?

Does AARP have a position on whether there should be an exception in the legislation for collectively bargained plans?

A: S. 1511 will impose the same obligations upon the collective bargaining process as did the IB prior to Betts. The IB clearly applied to collectively bargained benefit plans (including early retirement incentives), see Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir. 1988); EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984). It should be noted that in both these cases, the plans were found to be discriminatory as to the plaintiffs.

As with other civil rights laws, the ADEA applies to in-force collective bargaining agreements. Because S. 1511 merely restores well-accepted prior law, there is no reason to exempt any collective bargaining agreements from its provisions. (In fact, most collective bargaining agreements contain language specifically voiding any provisions that violate federal law.)

It makes little sense to provide union employees with fewer legal rights than non-union employees.

6. Q: According to a letter to Senator Pryor and Committee Members from the Public Employees Retirement System of Ohio, some 35 states have benefit plans which integrate disability and retirement benefits, and have done so for decades. They argue that the retroactivity provisions of S. 1511 would seriously disrupt those programs, would raise potential past liability, and uncertainty as to how and when the plans could be redesigned.

Can you comment on their concerns?

Are such concerns sufficiently valid, in your view, to suggest that the application to pre-ADEA plans should be reconsidered?

What about the fact that these are public plans developed through administrative and legislative processes of state governments? Should that have any bearing on whether S. 1511, if enacted, should apply to them?

A: No civil rights law shields public or private employers from liability solely because the discriminatory practice is one of long duration. To exempt an employer from compliance with the law solely to avoid disrupting its business would, in effect, reward those who have been discriminating for the longest periods of time.

(For example, Title VII of the Civil Rights Act of 1964 (which prohibits race, sex and national origin discrimination in employment) requires employers to provide absolutely equal benefits to employees regardless of race, sex or national origin. The prohibition clearly disrupted long-standing discriminatory benefits practices - a factor which was irrelevant to its application to state, local and private employers.)

The argument that pre-ADEA plans were previously clearly exempt from the provisions of the ADEA and from compliance with the IB is incorrect. The legislative history of the ADEA states that §4(f)(2):

> applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. (emphasis supplied)

H.R. Rep. No. 805, (Joint Committee Report), 90th Cong., 1st Sess. 4 (1967). Certainly, any plan that has been amended or modified since the passage of the ADEA in 1967 is expected to comply with the law.

AARP has not seen the letter sent by P.E.R.S. Ohio to Senator Pryor and other members of the Committee, and therefore cannot comment on the accuracy of the statements made and information provided therein. However, AARP can comment on a number of the issues raised in this context:.

- "Disruption of Programs": As noted above, the disruption of an existing program, even a benefits program, has never been an excuse for discrimination in any context.

  Any "disruption" S. 1511 may cause should have been anticipated by the existence of the IB and its application to state and local governments prior to Betts. Such disruption will be for the purpose of eliminating discrimination in these plans.

- "Potential Past Liability:" This is highly unlikely. The strict time limitations in the ADEA for filing charges, and the requirement that all class members "opt in" to a lawsuit provides employers with a fixed assessment of their liability fairly early in litigation.

- "Public Plans developed through state legislative or administrative processes:" Congress has applied the full force of the ADEA to state and local governments. The IB also applied with full force and effect to state and local governments. There is no reason to now exempt them from S. 1511, particularly since S. 1511 simply restores prior law.

- "Uncertainty as to Redesign of Plans:" The IB has provided a workable and reasonable road-map for compliance with the benefits discrimination provisions of the ADEA.

7. Q: Would private plans in force prior to enactment of the Age Discrimination in Employment Act also experience disruption comparable to that Ohio claims it and the 35 other states would experience?

Do you have any idea how many private plans would be effected by this provision?

A: This legislation simply restores prior law with regard to employee benefits under the ADEA. Therefore, employers who were previously complying with the law - which AARP believes to be the overwhelming majority of employers - will not have to make any changes in their benefits plan upon the passage of this legislation. The testimony of UNUM at the Senate joint Aging & Labor hearing on September 27, 1989, and of Ellen Fredel at the House joint hearing on September 21, 1989, reinforce AARP's view on this issue.

AARP has no empirical evidence, and no reason to believe, that a substantial number of benefit plans were not in compliance with the IB prior to Betts. To the contrary, AARP believes that the overwhelming majority of employers obey the law and have policies and benefit plans that comply with the ADEA and the long-standing IB.

Questions on Role of ERISA in Benefit Plan Regulation

8. Q: In testimony last week on this matter before committees of the House of Representatives, it was stated that ERISA already provides extensive protections for employee benefits.

Are you able to comment on the relationship of benefit plan protections for employees in ERISA to the Age Discrimination in Employment Act protections we are discussing today?

A: Although ERISA provides extensive protections for employee benefits, it does not prohibit or provide remedies for age, race, sex or national origin discrimination in employee benefits (with the exception of the 1986 OBRA amendments which prohibit age discrimination in pension plans). ERISA is compatible with, but does not supplant, the ADEA, Title VII or other civil rights laws regulating employment practices.

In addition, ERISA does not apply to benefit or pension plans of state or local governments - leaving employees such as Mrs. Betts solely reliant upon the non-discrimination laws for protection of their rights.

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October 12, 1989

Senator Howard Metzenbaum
Chairman
Subcommittee on Labor
United States Senate Committee
Labor and Human Resources
Washington, DC 20510-6300

Senator David Pryor
Chairman
Special Committee on Aging
United States Senate
Washington, DC 20510-6300

Re: S.1511, The Older Workers Benefit Protection Act and S.1293, The Age Discrimination in Employment Act Amendments of 1989

Dear Senators Metzenbaum and Pryor:

Thank you for the opportunity to testify at the joint hearing of the Labor Subcommittee and the Special Committee on Aging on S.1511, The Older Workers Benefit Protection Act and S.1293, The Age Discrimination in Employment Act Amendments of 1989, on behalf of the Association of Private Pension and Welfare Plans, the Chamber of Commerce of the United States, the National Association of Manufacturers, and the ERISA Industry Committee.

In your letter to me of October 2, 1989, you submitted additional questions of Senators Jeffords, Grassley and Pryor pertaining to my testimony. My responses to those questions are enclosed. Fred Rumack has assisted me in preparing these responses and has asked me to inform you that he has adopted the enclosed responses as his responses to the questions posed to him.

Senator Howard Metzenbaum
Senator David Pryor
Page 2
October 12, 1989

Thank you again for this opportunity to provide this further information which I trust will be useful to you and your committees in considering S.1511 and S.1293.

Respectfully yours,

Mark S. Dichter

Mark S. Dichter

MSD:al
Enclosures

cc: Fred Rumack

RESPONSE TO MARK S. DICHTER TO QUESTIONS OF SENATORS JEFFORDS, GRASSLEY AND PRYOR WITH RESPECT TO S.1511 AND S.1293

QUESTIONS OF SENATOR JEFFORDS

1. The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

Answer: The premise of this question is incorrect. As discussed in my prepared statement at the hearing, the EEOC in Abenante v. Fulflex argued to the 1st Circuit that the use of actuarial data that considered age created a prima facie violation of the ADEA. EEOC further argued that the "equal cost" standard cannot be met by a present value calculation using the same actuarial data. Since the EEOC's position interpreted the same "equal cost" standard that S.1511 and S.1293 would incorporate, these bills raised grave concerns for the future use of actuarial calculations that consider age.

2. Do you believe that the retroactive application of S.1511 will have any impact on the statute of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

Answer: As presently drafted, it does not appear that S.1511 would directly affect the ADEA's statute of limitations. As discussed in my testimony, I believe that the bill would unfairly disadvantage many employers by imposing retroactively a standard with respect to benefit programs which were adopted, negotiated and implemented prior to the imposition of the standard. The benefit policies potentially affected by S.1511 are generally used throughout American industry and the bill, therefore, would have broad and costly implications.

3. Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

Answer: EEOC itself recognized that voluntary early retirement programs could not qualify under its IB, and recommended to the court in Cipriano, and to this Committee in its testimony, that a separate standard be developed for such programs. Furthermore, numerous cases cited in my testimony where courts have rejected EEOC challenges to employment benefit practices under IB as well as those cases where such challenges to employee benefit practices have been successful demonstrate that a substantial number of plans did not comply with EEOC's interpretation of the IB.

From analysis done by Buck consultants on clients headquartered in the mid-atlantic region, nearly 50% offset severance programs with pension programs. However, if you weight that percentage by the number of employees, well over 50% participate in coordinated benefit plan structures. The larger companies also tend to have far more generous severance plans than smaller companies. It appears that the more generous the severance plan, the greater likelihood that it will be coordinated with a pension plan. Employers are less concerned about "duplicating" benefits, it the severance benefit is minimal.

The Supreme Court's decision in Alessi shows that ERISA encourages employers to increase the coverage of their benefit programs through integration of pension benefits with benefits like social security and workers compensation. The United Automobile, Aerospace & Agricultural Implement Workers of America in a letter to the House Education and Labor Committees has observed that it has negotiated employee benefit plans which integrate benefits such as severance or supplemental unemployment and pension benefits "with many companies."

Finally, as shown in the testimony of Fred Rumack, virtually all defined benefit pension programs in use today contain early retirement supplements or subsidies that could not meet the "equal cost" standard.

4. Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

Answer: In a letter to the House Ways and Means Committee the Chairman of the Board of USX has advised that a pre-Betts decision that its integrated severance benefit program violated ADEA "forces . . . removal" of the severance plan. Attached is a letter from the Sun Company which opted to comply with the EEOC guidelines, but felt that it was doing so to the detriment of its workers.

5. In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills?

Answer: The impact of S.1511 on employee benefit programs discussed in my testimony would generally and dramatically increase the cost of such programs. Where employers have the option to do so, it must be expected that specific benefit programs will be eliminated or reduced. For example, as noted above, employers will avoid the dramatic increase in benefit costs which would occur if the integration of severance and pension benefits were disallowed by eliminating the severance benefit program. Where benefits are vested, it must be expected that employers will seek to recoup the substantial added costs of adjusting their plans to meet the new standard by generally reducing future contributions to employee benefit programs, or reducing future accruals for future pension benefits.

6. Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

Answer: ERISA mandates the use of actuarial calculations in computing benefits under pension plans, a practice which EEOC's interpretation of the "equal cost" standard would jeopardize (see answer to question 1 above). Alessi shows that ERISA permits and encourages the type of benefit integration that S.1511 would prohibit. Finally, as discussed in my prepared testimony, the same benefit integration condemned by S.1511 is expressly mandated for Federal employees.

7. In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until

actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?

Answer: It is important in considering this question to distinguish between the cause of the termination of employment and the benefits, if any, the employee will receive upon that termination. For example, in a "shut-down" all employees, regardless of age, lose their employment. Benefit integration simply allocates limited resources among the employees affected by the shut-down in an intelligent and equitable manner. Thus, the limited funds available for severance benefits may be reserved for those employees who do not have the option of receiving immediate pension benefits. However, no employee is compelled by benefit integration to commence drawing retirement benefits at the time of a shut-down. Many employers provide enhanced pension benefits, or liberalize the terms on which benefits may be received in the case of a facility closing. Such generosity would certainly be discouraged by the additional costs S.1511 would impose.

8. A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you

agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answers in detail.

Answer: The integration of severance pay and pension benefits is only one of a number of very important issues involved in this legislation. Even with respect to just the issue of integration, the combination of other benefits with pensions, e.g., workers compensation, social security, disability, SUB benefits, are common practices in industry and some or all of these are put at issue by these bills. Additionally, voluntary early retirement programs, and the numerous features of defined benefit programs that provide subsidies or supplements for early retirement are at issue. The requirement of precise cost data, demanded by the EEOC in some cases, such as in EEOC v. City of Mt. Lebanon, may be difficult or impossible to obtain. Finally, the impact this new standard, which will substantially increase the cost of employee benefit programs is compounded by the bill's extraordinary retroactivity provision.

QUESTIONS OF SENATOR GRASSLEY

1. There is a kind of Alice in Wonderland quality about some of the discussion of Section 4(f)(2) which has occurred in the wake of the Betts decision. On the one hand, defenders of the Betts decision describe Section 4(f)(2) as "illogical, impractical, and harmful to most employees." On the other hand, critics of the Betts decision argue that this provision represents the settled understanding which has governed employee benefit plans for twenty years.

Although there is not necessarily a contradiction between these points of view as I have stated them, the defenders of the EEOC Bulletin do seem to be asserting that Section 4(f)(2) of the Bulletin is widely adhered to by employers and that there is no great groundswell of opposition to them.

What is the AARP view of this difference of opinion?

Is Section 4(f)(2) widely adhered to by employers?

Is there great discontent with them among employers? What evidence would you cite for your views on this?

Answer: While AARP took the position at the hearings that there is general compliance with EEOC's "equal cost" standard, it has participated in numerous litigated cases (sometimes at odds with EEOC) which demonstrate the contrary reality. For example, in Cipriano, where EEOC itself recognized that many voluntary early retirement programs could not meet its "equal cost" standard and should not be required to do so, AARP argued for a rigid application of that standard to such plans.

According to a letter to Senator Pryor and Committee members from the Public Employees Retirement System of Ohio, as noted in Senator Grassley's questions, some 35 states have benefit plans which integrate disability and retirement benefits, and have done so for decades. In addition, the numerous litigated cases involving challenges to the integration of severance benefits and pension benefits as well as the numerous other cases cited in my written testimony which involved various plans which did not meet the "equal cost" standard, demonstrate that numerous employers do not adhere to EEOC's interpretation of its "equal cost" standard. This fact is underlined by the recent letter to the House Education and Labor Committee from the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW") which states that it has negotiated such programs with many companies.

Finally, as shown in the testimony of Fred Rumack, virtually all defined benefit pension programs in use today contain early retirement supplements or subsidies that could not meet the "equal cost" standard. Mr. Rumack further testified that employers frequently integrate such benefits as social security, workers compensation, disability and severance with the pension plans.

2. Critics of S.1511 argue that it would prohibit "integration" or "coordination" of employee benefits. To what extent is "integration" of different employee benefits, such as severance pay and retirement pay, or disability pay and retirement pay, as in the Betts case, now common?

Would the Bill prohibit such practices?

How would the "benefit package" provisions of 4(f)(2) of the Bulletin bear on this question?

Answer: As discussed in response to Question 1 above, the practice of 35 states, the extent of litigation on the subject, the testimony of Fred Rumack, and the statement by the UAW all show that integration of various types of benefits with retirement programs is quite common. By expressly adopting a prohibition from the EEOC Interpretative Bulletin on including pension benefits in a "package" with any other form of benefit, S.1511 would prohibit this practice.

3. As you probably know, critics of S.1511 believe that the inability of employers to integrate certain types of benefits would result in increased costs to employers. In your view, would S.1511 result in increased costs to employers?

If so, what would their likely reaction be?

Answer: The inability to coordinate benefit programs with pension plans, would dramatically increase the cost of such programs, since employers would be required to duplicate these benefits for all individuals already eligible for a pension. The likely response by employers would be to reduce or eliminate presently coordinated benefits, like severance benefit programs. Where employers are not presently free to eliminate or reduce such benefits, they could be expected to seek to recoup the added cost by reducing future benefit accruals, including contributions made to improve pension benefits. Indeed, in Alessi, a unanimous Supreme Court recognized that the objective of benefit integration was to control plan costs so that benefits can be extended to the largest possible group of employees. Implicit in this policy is the recognition that, absent integration, the added costs of benefits will reduce the scope or extent of benefits employers can provide.

4. I would like you to comment on the distinction between a "safe harbor" and an "exclusive means" application of the "equal cost" rule of 4(f)(2). As I understand it, the Court argued that the original version of the "equal cost" rule was not intended to be an exclusive way of escaping classification as a subterfuge.

Can you elaborate on this distinction for me, and does AARP have a position on this issue?

Answer: The original Department of Labor guidelines regarding Section 4(f)(2), published in 1969, and the Department's opinion letters issued pursuant thereto, indicated that the Department would not assert that employers who provided lower levels of benefits to older employees violated ADEA if the benefit plan met the "equal cost" test. This was a "safe harbor" because, while it provided employers with an assured way to comply with the Department's interpretation of the ADEA, it nowhere stated that this was the only way in which employers could comply with the Act; employers could comply with the Act in other circumstances as well. Significantly, those interpretations did not state that an employer who failed to meet the "equal cost" test would be deemed to have violated the ADEA. In comparison, the 1979 Section 4(f)(2) interpretations illustrate the "exclusive means" concept. Under those guidelines, an employer may provide different levels of benefits pursuant to a bona fide employee benefit plan only if the variances in benefits result from age-related cost considerations. The EEOC will assert that an employer has violated the ADEA unless the employer can satisfy this test.

5. Some are concerned that enactment of S.1511 would limit the scope of collective bargaining with respect to employee benefits.

Are you able to say what the effect of S.1511, if enacted, on the scope of collective bargaining of S.1511 would be?

What would be the effect on currently in force collective bargaining agreements?

Does AARP have a position on whether there should be an exception in the legislation for collectively bargained plans?

Answer: S. 1511 would effect a dramatic disruption of collectively bargained benefits plans. Many of the private collectively bargained severance pay and pension plans in the United States integrate severance and disability benefits with pension benefits. Such agreements currently are in force in the automobile, steel, rubber, and meat packing industries, to name but a few. Indeed, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America ("UAW"), in a letter to Representatives Roybal, Clay, and Martinez, expressed concern that H.R. 3200, the House version of S. 1511, would prohibit the integration of such benefits -- a practice the UAW has negotiated with numerous companies. The invalidation of these plans could require the reopening of contract negotiations and could in turn result in strikes and litigation if the parties refused to bargain or could not reach agreement. The obvious effect on employees and industrial stability would be significant.

6. According to a letter to Senator Pryor and Committee Members from the Public Employees Retirement System of Ohio, some 35 states have benefit plans which integrate disability and retirement benefits, and have done so for decades. They

argue that the retroactivity provisions of S.1511 would seriously disrupt those programs, would raise potential past liability, and uncertainty as to how and when the plans could be redesigned.

Can you comment on their concerns?

Are such concerns sufficiently valid, in your view, to suggest that the application to pre-ADEA plans should be reconsidered?

What about the fact that these are public plans developed through administrative and legislative processes of state governments? Should that have any bearing on whether S.1511, if enacted, should apply to them?

Answer: The concerns of the Public Employees Retirement System of Ohio ("PERS") are valid. Any retroactive legislation imposes unexpected liabilities and obligations on those individuals and entities that are subject to the new law. Public and private employers have long provided benefits in ways which are not consistent with a strict interpretation of the EEOC guidelines but are consistent with their employees needs and their own limited resources. These benefit plans have been based on actuarial concepts and surveys of employee needs -- concepts that the retroactive application of S. 1511 will destroy, and needs that would go unmet if S. 1511 were applied prospectively.

The fact that PERS is concerned with public plans is significant. The public nature of these plans -- plans that are developed through administrative and legislative processes -- indicates that the integration of benefits is widespread and socially accepted. It also illustrates that S. 1511 is not in step with the views of representatives of the people in at least two thirds of the states,

7. Would private plans in force prior to enactment of the Age Discrimination in Employment Act also experience disruption comparable to that Ohio claims it and the 35 other states would experience?

Do you have any idea how many private plans would be affected by this provision?

Answer: The practices that S. 1511 would prohibit -- including integration of benefits, provision of early retirement incentives and subsidies, and workers' compensation and disability off sets -- are widespread among private employers. The precise methods that the plans use to implement these practices, and the specific amounts of benefits provided, are numerous and distinct. Nevertheless, as I have indicated in my previous answers, it is clear that S.1511 would have a profound adverse effect on the provision of benefits under such plans.

QUESTION ON ROLE OF ERISA IN BENEFIT PLAN REGULATION

8. In testimony last week on this matter before Committees of the House of Representatives, it was stated that ERISA already provides extensive protections for employee benefits.

Are you able to comment on the relationship of benefit plan protections for employees in ERISA to the Age Discrimination in Employment Act protections we are discussing today?

Answer: Section 4(f)(2) reflects the original Congressional intent that employee benefit programs would be regulated under ERISA rather than ADEA. ERISA provides comprehensive protection for vested retirement and pension benefits and expressly prohibits exclusion from a pension plan based on age. In addition to ERISA, Section 4(i) of the ADEA provides for continued accrual of pension benefits for individuals working beyond a plan's normal retirement age. Similarly, section 4(g) of the ADEA requires the maintenance of health insurance benefits regardless of costs on the same terms as provided to younger employees. Finally, ADEA itself now prohibits involuntary retirement as the basis of age and any employee benefit plan from providing lesser benefits to older employees for the purpose of discriminating in non-benefit terms.

QUESTIONS OF SENATOR PRYOR

General —

1. Mr. McCarthy has testified that Unum's clients have had no problem in living with the equal benefit or equal cost regulation. How are Unum's clients different from the employers you speak of who absolutely will not be able to continue to offer employee benefits under S.1511?

Answer: I do not know who Unum's clients are or what kind of benefit plans they have. My understanding, however, is that Unum principally provides its clients with group long-term disability insurance plans. Mr. McCarthy's testimony indicates that Unum's concern with respect to the ADEA has been to establish reducing benefit duration schedules that meet the equal cost test. As Mr. McCarthy specifically noted in his written testimony, he was speaking from an insurer's perspective and that "employers may have other issues." In contrast to insurers, the employers I spoke of are concerned with a different issue, namely the integration of benefits -- an issue Unum does not address. These employers generally provide their employees with comprehensive benefit packages that include non-insurance benefits such as severance benefits, supplemental unemployment benefits, early retirement benefits. The EEOC consistently has argued that such benefits cannot be integrated with pension benefits.

Thus, while Unum may be able to provide its clients with disability insurance policies that meet the equal cost test under the specific safe harbors in the EEOC's Interpretive Bulletin, employers who are prohibited from integrating benefits under S.1511 may be forced to reduce or eliminate the benefits they provide.

2. Do you feel that what happened to Mr. Sousa was fair, and why?

Answer: Mr. Sousa's employer and union representatives had negotiated a comprehensive benefits policy. Under that policy, during the period of time in which Mr. Sousa was eligible only for small or no pension benefits, he was nonetheless protected from some of the economic effects of a layoff or plant closing through a generous severance benefit policy. Similarly, during the time that Mr. Sousa was eligible for significant pension benefits, he still was protected by the severance benefit policy, although that protection was reduced to account for the fact that Mr. Sousa was also protected by the pension plan. At all times, Mr. Sousa received the full protection of the negotiated benefits policy; only the label placed on those benefits differed. Indeed, had there been no integration of benefits under Mr. Sousa's employer's plan, the benefits available to

Mr. Sousa from the pension plan or severance program undoubtedly would have been lower.

3. Do you feel that what happened to June Betts did not constitute age discrimination, and why?

Answer: What happened to Ms. Betts in terms of her personal life and her health was a tragedy of personal misfortune. I join with the Committee members in commending Ms. Betts' courage in returning to school and entering the work force when she did. It is generally true, as in Ms. Betts' case, that workers who become employed at an older age accumulate fewer years of seniority, and will, therefore, be entitled to fewer benefits than more senior employees. What happened to Ms. Betts happened because of her low seniority and unfortunate health problems. The benefits that she received were provided consistent with the legal requirements and purposes of the ADEA.

4. Why do you feel that planning techniques which were illegal prior to Betts, such as integration of pension and severance plans, should be allowed after S.1511 becomes law?

Answer: The question is based upon a false assumption -- that the integration of pension and severance benefits was unlawful prior to Betts. On the contrary, as the Supreme

Court held in a 7-2 decision, and as some lower courts had also held, such "planning techniques" were legal prior to and after Betts, and should continue to be permitted. The integration of benefits allows employers to spread limited resources among the maximum number of employees and to meet the varying needs of employees who are at different stages of their working careers.

5. Do you feel that it is fair for a small group of employers to be able to take advantage of the Supreme Court's mistaken interpretation of Congressional intent simply because they happened to be sued at the right time?

Answer: This question is based on the faulty assumption that the Supreme Court's decision in Betts was incorrect. The Court's seven to two decision in Betts was correct as a legal matter, and is not fairly subject to criticism on that basis.

Specific Question to Mr. Dichter

1. Have you ever told one of your clients to ignore the EEOC regulation because it does not represent reality in the world of employee benefits? Would this be sound practice for an attorney?

Answer: My advice to specific clients is privileged, and I am not free to disclose the substance of that advice. However, I can tell you generally that I have counselled clients as to: (a) the existence of the EEOC guidelines;

(b) my understanding of what those guidelines mean; (c) the various court decisions regarding those guidelines and section 4(f)(2), including the many court decisions which have rejected the EEOC guidelines; (d) the employment practices that the guidelines implicate; and (e) the practices of other employers, many of which are not consistent with the EEOC's guidelines. I have also litigated, on behalf of clients the validity of the EEOC guidelines. All of these activities constitute sound legal practice.

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October 11, 1989

Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human
  Resources
Washington, D.C. 20510-6300

Dear Senator Metzenbaum:

Thank you for inviting my response, which is attached, to additional questions on the effect of S.1511 and S.1293.

Sincerely,

Burton D. Fretz

Burton D. Fretz
Executive Director

Attachment

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RESPONSE TO QUESTIONS OF SENATOR PRYOR

General:

1. The legislative history of the ADEA does not indicate a Congressional intent to sanction discrimination in the area of employee benefits. To the contrary, Congress consistently intended the ADEA to cover employee benefits subject only to a narrow cost exception.

In offering a precursor amendment to section 4(f)(2) in 1967, Senator Javits stated explicitly that "an employer will not be compelled to afford older workers exactly the same pension, retirement or insurance benefits as younger workers and thus employers will not, because of the often extremely high cost of providing certain types of benefits to older workers, actually be discouraged from hiring older workers." 113 Cong. Rec. 31,254-31,255 (1967).

When the ADEA was amended in 1978 Senator Javits reaffirmed Congress' intention of requiring an economic justification for age discrimination in benefit plans: "[B]enefit levels for older workers may be reduced only to the extent necessary to achieve approximate equivalency in contributions for older and younger workers." 124 Cong. Rec. 8218 (1978).

2. The "equal benefit or equal cost" standard for section 4 (f)(2) is the only standard specifically and objectively applied in 20 years of the Act's interpretation. A minority of courts have hinted at a broader standard of "business justification" but have not applied it concretely enough to permit analysis of its correctness or practicality. A standard of "business justification," moreover, is so broad that it could be invoked for virtually any benefits plan, and so allow the exception to swallow the rule.

3. S. 1511 restores the law to its pre-Betts status. It embodies 20 years of administrative interpretation adopted by recent appellate court decisions. See, e.g., EEOC v. City of Mt. Lebanon, 842 F.2d 1480 (3d Cir. 1988).

4. S. 1511 does not appear to create new issues or conclude old ones. It does codify the administrative "equal cost" interpretation, which prior to Betts was accepted by the great weight of authority without the statutory underpinning.

5. Enactment of S. 1511 will not affect the offering of employee benefit plans. The ADEA did not affect such offerings for 22 years prior to Betts and would not do so if Betts is legislatively overturned.

(Questions for Mr. Fretz:)

1. S. 1511 does not create constitutional problems with an effective date of June 23, 1989, the date of the Betts decision. This effective date simply treats all parties and plans alike, and avoids any short and irrational gap in the law's application.

A statute with a short and limited period of retroactivity, required by the practicalities of producing federal legislation, is a "customary Congressional practice" and is especially appropriate where necessary to prevent employers from taking unfair advantage of the legislative process in order to frustrate the purpose of a change in law. Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 731 (1984).

Absent a Congressional directive or manifest injustice, a change in the law generally is applicable to pending cases. Bradley v. Richmond School Board, 416 U.S. 697, 711 (1974). No injustice arises here, where Congress is merely restoring the law which had been in effect for 20 years. Notably, the Committee Hearings produced no instance of prejudice to an employer who has changed its practice, in reliance on Betts, while Congress considers this legislation.

2. The claim that employers must be allowed to offset severance pay with pension benefits is indeed a non-issue, because this practice was illegal prior to Betts. The EEOC guidelines did not apply a "benefit package" approach to retirement plans, 29 C.F.R. 1625.10(f)(2)(ii), and the practice has been prohibited by the courts. EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); EEOC v. Westinghouse Electrict Corp., 725 F.2d 211 (3d Cir. 1983), cert. denied, 469 U.S. 820 (1984).

3. S. 1511 and S. 1293 generally achieve the same purposes but have two substantive differences. First, S. 1511 contains an effective date of June 23, 1989 and S. 1293 does not. Second, S. 1293 does not address the "benefit package" approach to benefit plans; S. 1511 does so by incorporating the regulatory provisions on this issue. Additional technical differences between the two bills are listed in the EEOC testimony of September 27, 1989.

QUESTIONS FROM SENATOR METZENBAUM

1. and 2. A key factor in the "benefit package" approach in the regulation is its inapplicability to a retirement or pension plan. Thus, severance pay could not be legally offset by the value of pension benefits prior to the Betts decision. (Case authority is discussed above in response to Senator Pryor's General Question No. 3. Policy reasons supporting this result are set forth in greater detail in my written testimony.)

3. Little empirical data exists on the prevalence or success of early retirement programs that do not have an upper age limit. The dearth of litigation on that issue, apart from the unusual case of Cipriano v. Board of Education, 785 F.2d 51 (2d Cir. 1986), permits an inference of the infrequency of such practices.

A 1986 study, Factors in the Retirement Decision, by Mutschler and Schultz of the Heller School, Brandeis University, analyzed one Fortune 500 company which offered several "open window" retirement incentives since 1980. On the average, workers who retired early under the plans left their jobs two years and five months sooner than they had planned. This study suggests that an incentive plan without an upper age limit operates successfully and constitutes much more than a retirement bonus.

QUESTIONS FROM SENATOR JEFFORDS

1. The use of actuarial assumptions and tables in the calculation of employee benefits occurs in determinations of coverage in such benefits as health insurance or life insurance plans. Such practices should not be affected by this legislation. I am unaware of the use of actuarial assumptions in other benefit areas.

2. The effective date provision should explicitly toll the applicable statute of limitations for bringing suit during the gap between the Betts decision and enactment of the legislation. Once this issue is resolved, no party can claim unfair advantage or disadvantage, as the law will treat all parties and plans alike.

3. The Law Center receives requests for assistance in about 150 ADEA cases annually. Information from these requests supplies no reason to believe that substantial numbers of benefit plans failed to comply with the EEOC interpretation prior to the Betts decision.

4. We know of no company which has terminated severance pay or similar benefits because it could not integrate them with pension benefits.

5. Prior to Betts, an employee benefit plan which discriminated against older workers required an age-related cost justification in order to satisfy the EEOC interpretation and the weight of judicial authority. This legislation will not alter the standard, but will codify this authority and therefore will clarify the rights of persons protected under the law.

6. I am not aware of any provision in the bills which is incompatible with other law.

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October 11, 1989

The Honorable David Pryor
Chairman, Special Committee on Aging
United States Senate
Washington, D.C. 20510

The Honorable Howard M. Metzenbaum
Chairman, Subcommittee on Labor
Committee on Education and Labor
United States Senate
Washington, D.C. 20510

Dear Chairmen Pryor and Metzenbaum:

This letter contains my written responses to the questions presented as a result of my testimony before the joint hearing conducted by the Special Committee on Aging and the Subcommittee on Labor of the Committee on Education and Labor regarding pending legislation to overturn the decision of the Supreme Court in Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989). I have enclosed a copy of my written testimony and, where appropriate, I have referred to it in response to the questions presented. If I can of any further assistance to either of the committees during your ongoing deliberations, I will make myself available at your convenience.

QUESTIONS OF SENATOR PRYOR

General:

1. Does the legislative history of the ADEA and section 4(f)(2) suggest that Congress intended to sanction age discrimination in the area of employee benefits?

Answer: The legislative history of the ADEA, both in 1967 and in 1978, indicates that Congress intended to sanction age discrimination in employee benefits only where justified by age-related cost considerations. A complete analysis of the legislative history is set forth at pages 8-14 of my written testimony.

2. Why do you believe that the "equal benefit or equal cost" regulation is the correct test for the 4(f)(2) exception?

Answer: It is the only standard which is consistent with the legislative history and more than twenty years of administrative regulations under the ADEA. Equally important, it is the only standard under which employees are protected against arbitrary age discrimination in employee benefits and employers are protected against undue expense when they can show that the cost of benefits increases based on age. Ironically, the decision of the Court in Betts needlessly sacrificed the first object (outlawing discrimination) at the expense of the second (undue expense).

3. Do you believe that S. 1511 accomplishes the goal of returning this area of the ADEA to the status quo before Betts?

Answer: Yes. Not only is S. 1511 consistent with the long-standing administrative regulations, it is also consistent with the case law developed in benefits discrimination cases.

4. Does S. 1511 settle any old disputes or create any new ones in this area of the law?

Answer: No. I might add that those who suggest that S. 1511 needs an amendment for early retirement plans (including the EEOC), are attempting to use S. 1511 to win a battle they have been unable to win in the courts. As my written testimony indicates (at pages 29-32 and Exhibit B), there are numerous non-discriminatory early retirement incentives which would be wholly unaffected by S. 1511. The only purpose of an amendment would be to render lawful those plans which the courts have previously found to be unlawful. In doing this, an amendment would drastically change the legal landscape by overturning such prominent decisions as Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 108 S.Ct. 2038 (1988). As Judge Posner wrote in Karlen, when an employer conditions an early retirement incentive based on age, it must satisfy the "equal cost" standard in order to avoid liability. There is simply no reason to overturn this well-reasoned opinion.

5. Do you believe that employers will stop offering employee benefit plans if S. 1511 becomes law?

Answer: There is not a shred of evidence to support this proposition. Indeed, since no employers discontinued employee benefits in 1979 when the Department of Labor issued its expanded interpretative bulletin, there is simply no reason to think it would occur now as the former status quo is reinstated.

Questions for Mr. Mackaronis:

1. Can you give me an example of a legitimate early retirement incentive plan which would be a violation of the ADEA if S. 1511 becomes law?

Answer: I know of no such example. S. 1511 would preserve the status quo regarding the legality of non-discriminatory early retirement incentive programs. Plans which were structured in a non-discriminatory fashion prior to *Betts* (examples of which appear in Exhibit B of my written testimony) would continue to be lawful because they do not differentiate based on age in violation of § 4(a)(1) of the ADEA. Under S. 1511, plans which provide different benefits based directly on age "had better be able to prove a close correlation between age and cost if [the employer] wants to shelter in the safe harbor of section 4(f)(2)." *Karlen v. City Colleges of Chicago*, 837 F.2d at 319 (incentive benefits declined precipitously at age 65). This is the state of the law as it existed before *Betts*.

As I indicated in my written testimony (pages 31-35 and Exhibit B), employers have successfully used a variety of non-discriminatory early retirement incentives that would continue to be lawful if S. 1511 were enacted into law. For example, companies have used a flat dollar incentive (*e.g.* *Armco, Inc*.- $400 per month; *Caterpillar*- $400 per month), an incentive based on a percentage of salary (*e.g.* *AT & T*- 5% annual salary plus 5% of each year of service; *Bank America Corp*.- 100% annual salary; *ITT*- 3 months pay plus one weeks pay for each year of service; *Illinois Bell Telephone Co*.- 100% annual pay; *3M Co*.- 6 months salary; *Northwestern Bell Corp*.- 2.5% of pay X years of service), an incentive based on years of service (*e.g.* *Eastman Kodak*- one weeks pay X years of service up to 26 weeks; *Firestone Tire & Rubber Co*.-2 weeks pay X years of service; *Northwestern Bell Corp*.- combination % salary and service; *Polaroid Corp*.- 3 weeks pay X service), and incentives granting employees the right to health insurance in retirement (*e.g.* *Hudson's*- same for retirees as active employees). *See* Hewitt Associates, *Samples of Early Retirement Windows and Voluntary Separation Plans*, 1-58 (1986).

Moreover, other employers have offered non-discriminatory retirement incentives as part of an existing pension plan. As my written testimony indicates (Exhibit B) this can be done by providing a flat dollar increase (*e.g.* *American Airlines*-$10 per month for each year of service), imputed service (*e.g.* *Atlantic Richfield*- 15 years additional service; *Northwestern Bell Corp*.- 3 years of age and service), or a percentage increase. *Id*. The point is, of course, that all these types of commonly utilized retirement incentives were lawful before Betts and would be lawful if S.1511 were enacted into law.

2. Do you feel that S. 1511 needs any modification at all in order to take into account legitimate early retirement incentive plans?

Answer: None whatsoever. All plans which were lawful before Betts would continue to be lawful under S. 1511.

3. Would you discuss the similarities and differences between S. 1511 and S. 1293?

Answer: In the section on "Findings," S. 1293 limits its language to "restor[ing] the traditional executive branch interpretation...." In my view, the broader statement contained in S. 1511 is preferable.

Because § 4(a)(1) of the ADEA was taken directly from § 703(a)(1) of Title VII of the Civil Rights Act, it may cause unnecessary misunderstanding to amend that section as is suggested by S. 1293. Congress' conscious design in making the ADEA and Title VII provisions parallel should be preserved. For that reason, the approach taken in S. 1511 (to add a definition of the phrase "compensation, terms, conditions or privileges of employment") is preferable.

In amending § 4(f), S. 1293 would leave in the "subterfuge" clause as it pertained to bona fide seniority systems while S. 1511 would delete it. Due to the enormous confusion created by the "subterfuge" language, it may be preferable to delete it altogether from the statute.

On employee benefit plans, S. 1293 would require a cost that "is equal" while S. 1511 would require that the cost "be no less than" the cost incurred for a younger worker. The language of S. 1511 provides greater flexibility to the employer in this regard.

With regard to compliance, S. 1293 does not provide for the "benefit package" approach while S. 1511 specifically incorporates the language of the regulations. Since the "benefit package" was instituted at the request of the business community, it presumably gives employers a greater degree of flexibility in complying with the ADEA.

S. 1293 omitted (apparently inadvertently) the pre-existing language of § 4(f)(2) which made it unlawful to refuse to hire an applicant due to an employee benefit plan.

S. 1293 does not, by its terms, apply to claims or cases pending on the date of the decision in Betts. For the reasons set forth in my written testimony (page 24), the effective date provision in S. 1511 would not work any hardship on employers.

QUESTIONS FROM SENATOR GRASSLEY

Questions for Chris Mackaronis:

1. There is a kind of Alice in Woderland quality about some of the discussion of Section 4(F)(2) which has occurred in the wake of the Betts decision. On the one hand, defenders of the Betts decision describe section 4(F)(2) as "illogical, impractical, and harmful to most employees." On the other hand, critics of the Betts decision argue that this provision represents the settled understanding which has governed employee benefit plans for twenty years.

Although there is not necessarily a contradiction between these points of view as I have stated them, the defenders of the EEOC bulletin do seem to be asserting that Section 4(F)(2) of the bulletin is widely adhered to by employers and that there is no great groundswell of opposition to them.

What is the AARP view of this difference of opinion?

Is Section 4(F)(2) widely adhered to by employers?

Is there great discontent with them among employers? What evidence would you cite for your views on this?

Answer: Since I am no longer employed by the American Association of Retired Persons, I cannot speak for them. Nevertheless, I can answer these questions, particularly based on my experience as a Senior Staff Attorney at the EEOC (1979-1985) where I had primary responsibility for ADEA regulations and policy development.

Shortly after the 1978 amendments to the ADEA, the Department of Labor issued proposed regulations pertaining to employee benefit plans at the behest of Congress. These regulations (discussed in detail in my written testimony at pages 16-19) amplified the "equal benefit or equal cost" concept that had been in effect since 1969. In commenting on the proposed regulations, employers agreed that the "equal cost" concept was consistent with the legislative history and only sought additional flexibility in its applicability.

Furthermore, during the past ten years I have spoken and lectured frequently to employer organizations and benefit groups on the "equal cost" concept and its applicability to all forms of employee benefit plans. Since the principle permits employers to avoid "undue expense" by reducing benefits where justified by increased costs, I have encountered no discontent with the principle of the regulations at all.

2. Critics of S. 1511 argue that it would prohibit "integration" or "coordination" of employee benefits. To what extent is "integration" of different employee benefits, such as severance pay and retirement pay, or disability pay and retirement pay, as in the Betts case, now common?

Would the bill prohibit such practices?

How would the "benefit package" provisions of 4(F)(2) of the bulletin bear on this question?

Answer: As I explained in my written testimony (pages 25-29 and Exhibit A), the benign-sounding term "integration" is nothing but discrimination when used to deprive a pension-eligible worker of severance pay benefits. To the extent the practice of "integrating" severance pay with pension benefits exists at all today, it is directly contrary to the specific regulations which have been in effect for more than ten years. See 29 C.F.R. § 1625.10(f)(2)(ii) ("A benefit package approach shall not apply to a retirement or pension plan."). The practice would continue to be unlawful under S. 1511, since it deprives older employees of benefits provided to younger employees at layoff. For a vivid description of the manner of discrimination, see Exhibit A attached to my written testimony.

3. As you probably know, critics of S. 1511 believe that the inability of employers to integrate certain types of benefits would result in increased costs to employers. In your view, would S. 1511 result in increased costs to employers?

If so, What would their likely reaction be?

Answer: Since S.1511 would do no more than reinstate the status quo ante, there are simply no new costs beyond those required before Betts.

4. I would like you to comment on the distinction between a "safe harbor" and an "exclusive means" application of the "equal cost" rule of 4(F)(2). As I understand it, the court argued that the original version of the "equal cost" rule was not intended to be an exclusive way of escaping classification as a subterfuge.

Can you elaborate on this distinction for me, and does AARP have a position on this issue?

Answer: The distinction, first made by the Supreme Court in Betts, evolves from an erroneous understanding of the limits of the § 4(f)(2) defense. Prior to 1978, two types of cases could arise under the defense-benefits discrimination cases and mandatory retirement cases. Since the mandatory retirement cases did not involve age-related benefits issues or costs, the courts permitted employers to defend these cases by showing a legitimate business purpose behind the mandatory retirement ("equal cost" or some other legitimate business purpose). By amending the ADEA in 1978 to outlaw mandatory retirement, Congress eliminated this general method of proof. What was left was the standard applicable to benefits discrimination cases since 1969, the "equal benefit or equal cost" test. That test has been the only one applicable to benefits discrimination cases since the ADEA was passed. See also my written testimony at pages 25-26.

5. Some are concerned that enactment of S. 1511 would limit the scope of collective bargaining with respect to employee benefits.

Are you able to say what the effect of S. 1511 if enacted, on the scope of collective bargaining of S. 1511, would be?

What would be the effect on currently in force collective bargaining agreements?

Does AARP have a position on whether there should be an exception in the legislation for collectively bargained plans?

Answer: Any impact on the collective bargaining process would be minimal. I note that some early retirement incentive plans which the courts have found discriminatory have been the product of collective bargaining. See e.g. Karlen v. City Colleges of Chicago, 837 F.2d 314 (7th Cir.), cert. denied, 108 S.Ct. 2038 (1988); Cipriano v. Board of Education of North Tonawanda, 700 F.Supp. 1199 (W.D.N.Y. 1988). Historically, and consistent with the AEDA's prohibitions, Congress and the Courts have not excused unlawful discrimination because it is embodied in a collective bargaining agreement. At times Congress has provided grace periods for compliance where an existing collective bargaining agreement might contain a practice banned in a new law, but to my knowledge Congress has never allowed a substantive "carve-out" for collective bargaining. In the case of S.1511, a grace period would be inappropriate because collectively bargained practices in place before Betts should be subjected to the pre-Betts rule of law.

6. According to a letter to Senator Pryor and committee members from the Public Employees Retirement System of Ohio, some 35 states have benefit plans which integrate disability and retirement benefits, and have done so for decades. They argue that the retroactivity provisions of S.1511 would seriously disrupt those programs, would raise potential past liability, and uncertainty as to how and when the plans could be redesigned.

Can you comment on their concerns?

Are such concerns sufficiently valid, in your view, to suggest that the application to pre-ADEA plans should be reconsidered?

What about the fact that these are public plans developed through administrative and legislative processes of state if enacted, should apply to them?

Answer: In 1974, Congress made the ADEA applicable to state and local governments, and that provision has been upheld by the Courts. Any state employer willing to undertake this risk is hardly burdened by a change in the law which does no more than require them to do what they should have been doing in the first instance.

Moreover, as we have seen from the vast numbers of successful cases brought by both the EEOC and private litigants regarding the mandatory retirement of fire fighters and police, states often legislate discriminatory restrictions in violation of the ADEA. The discriminatory provisions of state disability laws should fare no better than other age-discriminatory practices.

7. Would private plans in force prior to enactment of the age discrimination in employment act also experience disruption comparable to that Ohio claims it and the 35 other states would experience?

Do you have any idea how many private plans would be effected by this provision?

Answer: Due to the 1974 passage of ERISA, and the myriad significant changes to ERISA the Internal Revenue Code and the ADEA since then, it is patently clear that no private pension plan today bears any resemblance to its pre-1967 ancestors.

8. In testimony last week on this matter before committees of the House of Representative, it was stated that ERISA already

provides extensive protections for employee benefits.

Are you able to comment on the relationship of benefit plan protections for employees in ERISA to the age discrimination in employment act protections we are discussing today?

Answer: ERISA's reporting and disclosure requirements pertaining to employee benefit and welfare plans do not, and never were intended to, provide protections against discrimination based on age. The ADEA is the only federal law which occupies this field for most employees, and it should be amended to make clear that discrimination in employee benefits based on age is unlawful.

QUESTIONS OF SENATOR JEFFORDS

1. The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

Answer: No. This is a red herring raised by opponents to S. 1511. The ADEA, as amended by S. 1511, would only make it unlawful to provide different employee benefits based on age when no cost justification existed. As before Betts, employers would be free to use actuarial assumptions in calculating pension benefits and in formulating other legitimate aspects of plan design. The simple fact is that under S. 1511, as before Betts, the use of actuarial factors in plan design would not result in discriminatory benefits for older workers and, as a consequence, would not create a problem under the ADEA.

2. Do you believe that the retroactive application of S. 1511 will have any impact on the statue of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

Answer: As EEOC General Counsel Charles Shanor testified before the Senate, the retroactive application would create problems for those victims of age discrimination in employee benefits who (a) had not brought an "action or proceeding" by June 23, 1989, and (b) whose 2-year statute of limitations may expire before corrective legislation is passed. I forsee no disadvantage to employers since S.1511 would do no more than reinstitute the law pre-Betts.

3. Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

Answer: No. While with the Equal Employment Opportunity Commission and later the American Association of Retired Persons, I spoke and lectured frequently to employer organizations (e.g. the Equal Employment Advisory Council, Organization Resources Counselors, Inc., Merchants & Manufacturers Association, Chambers of Commerce), benefit consulting groups (e.g. the International Foundation of Employee Benefit Plans, Society of Professional Benefit Administrators), and bar associations regarding the "equal benefit or equal cost" concept under § 4(f)(2) of the ADEA. There was neither widespread hostility to those regulatory concepts nor any indication that compliance was not fair to the employers affected.

4. Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

Answer: No.

5. In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills?

Answer: Only those employers previously violating the ADEA will be required to amend their benefit plans to conform to the requirements of S. 1511. To the extent these amendments help to eliminate arbitrary (non-cost justified) discrimination, it will result in greater participation of older workers in the labor force, a desirable result in light of long-range demographic trends which indicate growing shortages of younger workers.

6. Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

Answer: No. While opponents of S. 1511 suggest that the concept of "integration" is permitted under ERISA, that comparison is meaningless. Although ERISA does permit a pension plan to offset certain amounts payable under social security, employees with the same service and salary are *identically affected* by the practice of "integration" which ERISA sanctions. Thus, for example, similarly situated employees may have the same $100 offset from their pensions at age 65 and thereafter.

Unlike the "integration" permitted by ERISA, integration of severance pay and pension benefits results in *unequal* benefits based on age. As can be seen from Exhibit A to my written testimony, the process of severance "integration" enables a younger employee to receive a pension *plus* severance *while an older worker with the same service and salary receives only a pension*. This type of overt discrimination has always been unlawful under the ADEA. *See also* my written testimony at 30 n.13.

With regard to disability benefits and pensions, there appears to be confusion among opponents of S.1511. The Interpretative Bulletin *never* required employers to simultaneous provide disability benefits and pensions. While at the EEOC from 1979 to 1985, I prepared numerous letters to employers from the EEOC Legal Counsel indicating that an employee receiving disability benefits is considered "employed" and, therefore, need not be simultaneously provided pension benefits under the ADEA. In this regard, it was the EEOC's position that the *employee* retained the right to chose disability *or* pension, but not both. Presumably the employee would chose the benefit that provided the greater monthly benefit. S.1511 would not change this approach.

7. In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?

Answer: The question underscores one of the many discriminatory affects of severance "integration." Denied of a lump sum severance benefit, an older employee almost invariably must commence the receipt of a pension to make ends meet during the search for new employment. This premature commencement of the pension drastically reduces its value and, in the long run, threatens the retirement security of all employees involved.

8. A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answer in detail.

Answer: No. For more than twenty years, the administrative agencies and the courts have been in agreement with the Congress that the ADEA prohibits the denial of severance benefits to employees eligible for pensions. There is no good reason now to revisit what was, until Betts, a settled legal issue.

Respectfully submitted,

C.G. Mackaronis

Christopher G. Mackaronis

CGM/sb

RESPONSES OF KEVIN McCARTHY TO QUESTIONS ASKED BY SENATOR JEFFORDS

QUESTION ONE

The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of emloyee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

ANSWER

Although UNUM Corporation is not in a position to estimate what the EEOC will do, we have no reason to believe that the passage of either bill will make it unlawful for employee benefit plans to continue to use actuarial computations. Additionally, we have no reason to believe that the EEOC will not allow such actuarial computations.

S. 1511, by incorporating subsections (d)(1), (d)(2), (d)(3) and (f) of Section 1625.10, Title 29, Code of Federal Regulations, implicitly allows cost justification based on generally accepted actuarial principles such as actuarial smoothing, averaging and extrapolation.

QUESTION TWO

Do you believe that the retroactive application of S. 1511 will have any impact on the statute of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

ANSWER

No, the retroactive application of S. 1511 should have minimal impact on our group long term disability and group life policyholders because they have been in compliance with the ADEA since its enactment.

QUESTION THREE

Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

ANSWER

Virtually all of our 28,245 group long term disability policyholders and our group life policyholders are in compliance both with the ADEA and the EEOC's Interpretive Bulletin.

QUESTION FOUR

Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

ANSWER

Severance pay benefits are not within the realm of our expertise. However, with respect to long term disability benefits, we are not aware of any of our policyholders terminating long term disability benefits for their employees because they were not permitted to integrate such benefits with pension benefits.

Our long term disability plans integrate with pension plans. For example, John Doe, age 61, is employed by ABC Company. ABC's employee benefit plan provides long term disability benefits and pension benefits (50% employer-funded, 50% employee-funded) for its employees. Mr. Doe becomes disabled while working for ABC Company and is eligible to receive disability benefits. To the extent that Mr. Doe receives pension benefits from the employer-funded portion of the pension plan, we integrate John Doe's disability benefits with these pension benefits. We do this to prevent an economic incentive for Mr. Doe to remain disabled and not return to work. By such integration, Mr. Doe's combination of disability benefits and pension benefits do not exceed his pre-disability earnings. We do not integrate with IRAs, 401(k) plans or any other voluntary, employee-funded pension amounts.

QUESTION FIVE

In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills?

ANSWER

We do not believe the passage of these bills will have an impact on our long term disability or group life policyholders.

After the ADEA became effective and we developed a set of reducing benefit duration schedules in compliance with the ADEA and the DOL's Interpretive Bulletin, virtually all of our long term disability policyholders adopted one of our schedules without objecting to the additional cost of coverage for older workers provided by the schedules. After the Betts decision, virtually none of our policyholders requested any change in their plans.

QUESTION SIX

Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

ANSWER

No; to the best of our knowledge the bills are not incompatible with the above referenced laws.

QUESTIONS SEVEN AND EIGHT

In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?

A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answers in detail.

ANSWER

Severance pay benefits and pension benefits are not within our area of expertise. Therefore, any response we may give would not be helpful.

RESPONSES OF KEVIN McCARTHY TO QUESTIONS ASKED BY SENATOR PRYOR

GENERAL QUESTION ONE

Does the legislative history of the ADEA and section 4(f)(2) suggest that Congress intended to sanction age discrimination in the area of employee benefits?

ANSWER

We do not believe that the history of the ADEA suggests that Congress intended to sanction arbitrary age discrimination in employee benefit plans.

We have operated for over 20 years under the premise that the ADEA is applicable to employee benefit plans. The text and structure of the section 4(f)(2) exemption, as indicated by its legislative history, limits the exemption to benefit plans whose discrimination against older workers is non-arbitrary (i.e., not a subterfuge). Non-arbitrary discrimination permits age-based reductions in employee benefit plans where such reductions are justified by cost considerations.

GENERAL QUESTION TWO

Why do you believe that the "equal benefit or equal cost" regulation is the correct test for the 4(f)(2) exception?

ANSWER

We believe that the "equal benefit or equal cost" regulation is the appropriate test for the section 4(f)(2) exemption because it is a clear, objective standard. This standard provides a relatively easy and uniform measurement by which employers and insurers can determine nondiscriminatory benefit reductions for older workers. Employers and insurers need a clear standard by which results can be reasonably tested. Without a clear, objective standard we risk increasing litigation and discriminatory employee benefit plans.

GENERAL QUESTION THREE

Do you believe that S. 1511 accomplishes the goal of returning this area of the ADEA to the status quo before Betts?

ANSWER

For long term disability and group life benefit plans, yes, with the technical modifications we recommended in our testimony.

GENERAL QUESTION FOUR

Does S. 1511 settle any old disputes or create any new ones in this area of the law?

ANSWER

Technically no; but S. 1511 now clarifies that actuarial averaging is expressly allowed in justifying costs by incorporating subsections (d)(3) and (f) of Section 1625.10 of the Code of Federal Regulations. These subsections would become law and not just interpretive guidelines.

GENERAL QUESTION FIVE

Do you believe that employers will stop offering employee benefit plans if S. 1511 becomes law?

ANSWER

No; our experience with long term disability and group life policyholders is that employers will not terminate their employee benefit plans if S. 1511 becomes law.

QUESTION ONE FOR MR. McCARTHY

In your testimony you describe your system of ensuring that your plans comply with the equal benefit or equal cost test. Have any of your clients ever complained about having to structure a plan to comply with EEOC regulations?

ANSWER

No; not to our knowledge. After the ADEA became effective and we developed a set of reducing benefit schedules in compliance with the ADEA and the DOL's Interpretive Bulletin, virtually all of our 28,245 group long term disability policyholders adopted one of our schedules without objecting to the additional cost of coverage for older workers provided by the schedules. Also, no insured employee has indicated to us that the benefits received under our schedules are unfair or discriminatory.

QUESTION TWO FOR MR. McCARTHY

Have any of your clients ever expressed an interest in purchasing a plan which violated EEOC regulations interpreting section 4(f)(2)?

ANSWER

No; not to our knowledge.

QUESTION THREE FOR MR. McCARTHY

Tell me why Unum believes that equal benefit or equal cost is the proper test for compliance with section 4(f)(2)?

ANSWER

We believe that the "equal benefit or equal cost" regulation is the appropriate test for the section 4(f)(2) exemption because it is a clear, objective standard. This standard provides a relatively easy and uniform measurement by which employers and insurers can determine nondiscriminatory benefit reductions for older workers. Employers and insurers need a clear standard by which results can be reasonably tested. Without a clear, objective standard we risk increasing litigation and discriminatory employee benefit plans.

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DOUGLAS S. McDOWELL

October 11, 1989

HAND DELIVERED

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
SD-428 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable David Pryor
Chairman
Special Committee on Aging
SD-G31 Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 1511 and S. 1293 -- Responses to Questions From Senators Pryor, Grassley and Jeffords

Dear Senators Metzenbaum and Pryor:

As requested, enclosed are my responses to the additional questions from Senators Pryor, Grassley and Jeffords pertaining to my testimony on these bills.

Thank you for the opportunity to testify at the joint hearing and to respond to these questions.

Very truly yours,

Douglas S. McDowell

Douglas S. McDowell

Enclosure

cc: Senate Labor and Human Resources
Committee Members
Senate Aging Committee Members

RESPONSES OF DOUGLAS MCDOWELL TO QUESTIONS OF SENATOR PRYOR FOR PANEL III WITNESSES DICHTER, RUMAK, SHORT AND MCDOWELL

General:

Q #1. Mr. McCarthy has testified that Unum's clients have had no problem in living with the equal benefit or equal cost regulation. How are Unum's clients different from the employers you speak of who absolutely will not be able to continue to offer employee benefits under S. 1511?

A #1. None of the witnesses contended that employers will not be able to continue to offer any employee benefits if S. 1511 is enacted. They have explained that the bill as drafted could jeopardize early retirement incentive programs -- an argument with which the EEOC agrees. The witnesses also argued that if retirement and pension benefits could not be considered as part of a "benefit package", and employers were required to double up and pay both retirement and severance pay to employees, many employers with a relatively fixed allocation of funds for employee benefits might find it necessary to make adjustments in the relative level of benefits.

Mr. McCarthy's testimony dealt with only one benefit -- long term disability insurance provided by UNUM. He did not address the other important issues before the Committee -- whether Congress should adopt EEOC's interpretation that "a benefit package approach shall not apply to a retirement or pension plan," 29 C.F.R. § 1625.10(f)(2)(ii), or whether employers will be able to continue to provide the same level of benefits under early retirement incentive programs, severance pay or other benefit plans if S. 1511 is enacted.

As described in Mr. McCarthy's testimony, UNUM has established an "age-based reducing benefit duration schedule" for long-term disability benefits. In other words, the later in life a worker becomes disabled, the greater the cost of the coverage. Accordingly, UNUM reduces benefit levels based upon a "cost-justified age reduction benefit schedule." Many employers use a similar formula.

As Mr. McCarthy recommended, a safe-harbor allowing a reduction in benefits based upon age-related cost factors should be preserved if legislation is enacted. This safe-harbor should not be an exclusive defense, but should be available to the employer when age-based group cost data exists.

Notably, Mr. McCarthy did not provide any economic data supporting UNUM's age-based cost reductions. Without such data, it is impossible to determine whether the type of data UNUM generates would be sufficient to insulate its clients from EEOC lawsuits. In EEOC v. City of Mt. Lebanon, Pennsylvania, 842 F.2d 1480 (3d Cir. 1988), the EEOC attacked the long-term disability cost data provided the City by its insurance carrier. The EEOC argued that:

> it simply does not make common sense that an economic purpose for a specific graduated benefit reduction schedule [the MEIT PLAN] can be shown through general data that is not in any way connected with the specific reductions maintained by the schedule.

842 F.2d 1490. If the EEOC would not accept the type of economic data provided by UNUM, and UNUM's client had no data of its own, the plan could be found to violate the ADEA.

Q #2. Do you feel that what happened to Mr. Sousa was fair, and why?

A #2. Yes. Mr. Sousa's case was heard before a federal district court, which ruled that the plan at issue did not violate the ADEA. Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I. 1988), aff'd on appeal. The court ruled "these employees did not have their separation pay taken away; rather, the employees were not entitled to the separation pay in the first instance." Id. at 299. The court also stated that:

> the evidence supports the finding that the value of the total benefits received by similarly situated older employees is at least equal to and in some instances exceeds the value of the total benefits received by similarly situated younger employees.

701 F. Supp. at 300. Where an employer can meet this cost defense, there is no age discrimination and hence no violation of the ADEA.

In fairness, the Committee may wish to hear from Fulflex, the employer in Mr. Sousa's case, before making a judgment on the this particular plan and its application to Mr. Sousa. The opinion does point out, however, that beginning in 1966, Fulflex negotiated an agreement with the Rubber Workers Union that provided separation pay even for those who were not eligible for retirement. Mr. Sousa and others thus had the benefit of a contractual obligation for severance pay which the employer was not obligated to provide.

Q #3. Do you feel that what happened to June Betts did not constitute age discrimination, and why?

A #3. In Public Employees Retirement System of Ohio v. Betts, 109 S.Ct. 2854 (1989), the Supreme Court held that the Sixth Circuit was incorrect in its 2-1 ruling that June Betts had a cause of action under the Age Discrimination in Employment Act of 1967 (ADEA). That case has been remanded to the Sixth Circuit, which will hear oral argument on November 7, 1989. The Sixth Circuit will determine whether the ADEA was violated, although dismissal appears warranted under the Supreme Court's decision.

There is insufficient evidence on the public record as to whether this plan would violate the ADEA either under the EEOC's Interpretative Bulletin or S. 1511. Apparently relying on the fact that this was a pre-Act plan, and hence not covered by the ADEA under United Air Lines v. McMann, 434 U.S. 192 (1977), the State did not submit cost justification data in opposing the plaintiff's motion for summary judgment. If such data is submitted on remand, more analysis would be required.

Q #4. Why do you feel that planning techniques which were illegal prior to Betts, such as integration of pension and severance plans, should be allowed after S. 1511 becomes law?

A #4. The question is premised upon the assumption that the law was settled prior to Betts. That assumption may be based upon the fact that the EEOC's Interpretative Bulletin did not permit retirement and pension benefits to be considered in the "benefit package" approach. See 29 C.F.R. § 1625.10(f)(2)(ii). The EEOC's interpretation, however, does not have the force and effect of law. It is the opinion of an agency which provides guidance, but is not controlling on the courts. In court, the agency can be asked to substantiate its reasoning, its consistency with other agency pronouncements, its consistency with the statute and its history, "and all those factors which give [the agency] power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

Indeed, when the Interpretative Bulletin was included in the Federal Register, the Introductory portion of that part of the Subchapter on Age Discrimination provided as follows:

> § 860.1 Purpose of this part.
>
> This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it' (Skidmore v. Swift & Co., 323 U.S. 134, 138 [65 S. Ct. 161, 163, 89 L.Ed. 124]). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

Prior to Betts, prevailing law permitted the integration of pension and severance plans. See Parker v. Federal National Mortgage Association, 741 F.2d 975 (7th Cir. 1984); Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985); Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751 (N.D. Ill. 1988); EEOC v. Firestone Tire & Rubber Co., 650 F. Supp. 1561 (W.D. Tenn. 1987); and Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I. 1988).

Moreover, during the same session of Congress that enacted the ADEA, Congress enacted legislation that integrated pension and severance benefits for federal employees. Retirement-eligible civil service employees do not receive severance pay, 5 U.S.C. § 5595(a)(2)(B) (iv). Neither do members of the armed forces. 10 U.S.C. §1186 (voluntary retirement); 10 U.S.C. § 1174(e)(involuntary discharge or release). Similarly, severance payments received are deducted from pension payments to a regular warrant officer of the Coast Guard, 14 U.S.C. § 286a(d), or an officer of the National Oceanic and Atmospheric Administration. 33 U.S.C. § 853(h). It is highly improbable that the same Congress that enacted these specific limitations for the federal workforce banned similar policies in the ADEA by mere implication but with no specific language.

The only circuit court decision finding a violation of the ADEA because of the integration of pension and severance plans was EEOC v. Westinghouse Electric Corp., 869 F.2d 696 (3d Cir. 1989), pet. for cert. granted, vacated and remanded for reconsideration in light of Betts, October 2, 1989. In EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984), the court found a violation in the denial of a one-time severance payment to retirement eligible employees. But it stated that "[w]e recognize that a severance pay policy which is an integral part of a complex benefit scheme might be regarded differently . . ." 724 F.2d at 1397.

Indeed, even within the Third Circuit, a district court indicated its disagreement with the Westinghouse decision, and indicated that if it were a matter of first impression, it would agree that a plan which offset severance pay from pension payments did not constitute age discrimination. See EEOC v. USX Corporation, 10 Empl. Benef. Cases 2341, 2346 (E.D.Pa. 1989). The court also stated:

> Although I am compelled to follow the law as set forth in Westinghouse III, EEOC's position causes no little concern for the plight of employees subject to layoff in the future. Since layoffs are usually the result of employers' cost-cutting measures in years of economic decline, USX may simply decide it cannot afford both the present rate of pensions plus severance and terminate all severance pay.

Id. at 2350.

The policy reasons for permitting retirement, pension and severance plans to be considered as part of the benefit package approach are set forth in my September 27, 1989, written Statement to the Committee on pp. 14-20.

Q #5. Do you feel that it is fair for a small group of employers to be able to take advantage of the Supreme Court's mistaken interpretation of congressional intent simply because they happened to be sued at the right time?

A #5. The question apparently refers to Section 5(b) of S. 1511 which states that the Act shall apply to all ADEA actions or proceedings pending on the date of the _Betts_ decision. As noted in the answer to Question 4, at best the law on integration of benefits was unsettled when _Betts_ was decided, with many of the decisions favoring employers. In light of the case law, it would be unfair to apply S. 1511 retroactively. Moreover, employers whose arguments are upheld by the Supreme Court should be assured of some finality to litigation. In addition, given the large amount of attorney's fees, court costs and other expenses, employers with suits pending when _Betts_ was decided are hardly likely to feel they benefited in any way by being sued.

Mr. Dichter and Mr. McDowell

Q #1. Have you ever told one of your clients to ignore the EEOC regulation because it does not represent reality in the world of employee benefits? Would this be sound practice for an attorney?

A #1. Where the law is clearly prohibitive of certain conduct, I advise clients that they must comply. For example: (1) employers cannot involuntarily retire any individual because of age; employers must accrue pension benefits for individuals who work after normal retirement age (Section 4(i)); and employers cannot discriminate in health insurance benefits against employees or spouses aged 65 or older (Section 4(g)).

Where the law is unclear, the options are explained to the client, including the interpretation of the law that has been taken by the EEOC. For example, with respect to the integration of pension benefits, the client would be informed:

1. As noted in answer 4, the EEOC's interpretation is not a regulation that has the force and effect of law.

2. A strong argument can be made that the EEOC's position to exclude pension and retirement benefits from the "benefit package" approach is not supported by the statute or its legislative history. The history speaks of the "age-based cost

defense" as a safe harbor, not an absolute requirement.

3. The EEOC and other plaintiffs, however, are likely to sue an employer that offsets severance pay from retirement or pension payments.

4. The case law is split, and there is case authority supporting the EEOC's view. The outcome of the suit may depend upon the circuit in which the case is brought.

After all the factors are weighed, the client can make an informed choice as to what policy to adopt.

RESPONSES OF DOUGLAS MCDOWELL TO QUESTIONS OF SENATOR JEFFORDS FOR ALL WITNESSES ON PANELS II AND III REGARDING S. 1511 AND S. 1293

Q #1. The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

A #1. The EEOC has taken the position in litigation that it is a violation of Section 4(a)(1) of the ADEA for an employer to use age-based actuarial computations to offset the present value of retirement benefits against severance pay. See EEOC brief in Abenante and EEOC v. Fulflex, Inc., 1st Cir., Nos. 89-1179 and 89-1180. Thus, in addition to arguing that severance pay and retirement benefits are separate benefits with separate purposes, the EEOC urged that the use of actuarial tables per se violated the Act when comparing the relative value of these two benefits.

Thus, EEOC reasoned that the proper consideration under Section 4(a)(1) "is whether each individual employee receives equal actual benefit payments irrespective of age." Br. at 16. The EEOC urged that each person should be considered as an individual, and that "'actuarial mathematics' is based on 'the law of averages and does not predict effects upon one individual.'" Id. Because some older workers may not live to enjoy their full retirement benefits, the EEOC urged that the use of age-based actuarial tables violated the ADEA. Br. at 15-16.

Of course, at any given time, the value of many benefits can only be calculated based on present value calculations based on age-based actuarial data. This is true of life insurance, health insurance, long term disability benefits and retirement/pension benefits. Because of this actuarial fact, the Interpretative Bulletin allows the consideration of age-based cost factors in determining the relative value of benefits under the benefit package approach. The logic of EEOC's argument in Fulflex could be extended to these other benefits.

Nothing in the present bill would stop the EEOC from continuing to take its Fulflex position in future litigation in similar cases.

Experience has shown that assurances from government agencies or legislative history are not enough to ensure that the intent of Congress is carried forward. For example, when the ADEA was amended in 1978, the Department of Labor and Congress agreed that employers would not be required to accrue pension benefits for employees who worked after normal retirement age. A letter to this effect from the Department of Labor was inserted into the legislative history. See, e.g., S. Rep. No. 493, 95th Cong., 1st Sess. 1, U.S. Code Cong. Admin. News 1978, p. 504, cited in Von Aulock v. Smith, 720 F.2d 176, 182 (D.C. Cir. 1983); H.R. Rep. No. 587, 95th Cong. 1st Sess. 9 (1977).

The legislative debates confirmed that no pension accrual was required after normal retirement age. Von Aulock, 720 F.2d at 184. When the I.B. was published in 1979, it clearly stated that post-normal retirement accruals, contributions or adjustment were not required. 44 Fed. Reg. 30,648 (1979)(codified at 29 C.F.R. § 860.120(f)(iv)(B)(1981)(later § 1625.10(f)(1)(iv)(B)) (rescinded).

But when the EEOC took over enforcement of the ADEA, it inexplicably proposed to change the I.B. to require pension accruals after normal retirement age. This proposal prompted former Secretary of Labor Ray Marshall to write a letter to EEOC Chair Eleanor Norton protesting that the proposed change was contrary to the 1978 legislative history. The EEOC proposed change was blocked by the Office of Management and Budget, and ultimately resulted in a lawsuit from the AARP which attempted to force the Reagan Administration to issue the new interpretation. See AARP v. EEOC, 655 F. Supp. 228 (D.C. Cir. 1987), rev'd, 823 F.2d 600 (D.C. Cir. 1987).

Accordingly, under S. 1511, there can be no assurance that such tables will not have to be litigated in suits brought by the EEOC or other plaintiffs.

Q #2. Do you believe that the retroactive application of S. 1511 will have any impact on the statute of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

A #2. Section 7(d)(1) and (2) of the ADEA provides that an individual must file a charge within 180 days of an alleged discriminatory act. The period is extended to 300 days in a state with a deferral agency. S. 1511 would not affect this requirement. Persons who did not file charges within this time period would be unable to file a timely ADEA charge. The proponents of this legislation contend that the law was clear, and that S. 1511 merely restores pre-Betts law. Given this position, it is not unfair to apply the existing limitations period to charges that were not filed in a timely manner before the Betts decision.

Q #3. Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

A #3. As explained in detail in my answer to Senator Pryor's Question 4, the law on the integration of benefits was substantially at odds with the EEOC's interpretation. Surveys show that about 40% of collectively bargained plans provide pension benefits for eligible employees and severance pay to those who could not qualify for a pension. See Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts, (BNA) No. 144 at 53:4 (April 6, 1989).

The September 25, 1989, Congressional Research Service Report stated:

> To allow inclusion of a pension benefit would constitute a change in the policy that existed before the Betts decision; disallowing inclusion of a pension would render unlawful many existing employee benefit plans that have been operating in noncompliance with the Interpretive Bulletin (some of which have been in litigation).

Report at CRS-5. CRS also noted that "these arrangements, which are often collectively bargained, attempt to balance the financial hardships caused by layoffs and plant closings with limited financial resources." Id.

The September 21, 1989 letter from the United Auto Workers to the House Committee Chairmen explained that the UAW had "negotiated integrated benefit programs with many companies" and that the bill "should be amended to expressly permit integrated benefit programs." Other union contracts would be similarly affected.

As the CRS Report stated: "These issues are very complex and need further study." Report at CRS-1.

Q #4. Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

A #4. As noted, the EEOC interpretation on integration is in dispute. A substantial body of case law permits the integration of benefits. Many companies have determined that the ADEA permits integration of severance and pension benefits and have done so. Many companies also have indicated that if they could not integrate pension and retirement payments into the "benefit package" approach, they may have to decrease the level of certain benefits, such as severance pay, in order to assure that the overall level of benefits' cost does not become too expensive. To the extent that employers decided not to chance prosecution by the EEOC, it may be assumed that the level of benefits is lower than it would have been if integration had been sanctioned by the EEOC. Specific information gained from individual clients is privileged.

Q #5. In what ways, positive or negative, may employers be compelled to change employee benefit plans as the result of the passage of these bills?

A #5. As the EEOC argues, by placing "employee benefits" in Section 4(a)(1), S. 1511 may prohibit the use of any age limitations in early retirement incentive programs. The logic of this argument may also extend to normal retirement ages, which are not necessarily protected by Section 4(i)(8). Also, if retirement benefits cannot be included in the "benefit package" approach, employers may decide to reallocate limited resources and cut back on the present level of certain benefits. These arguments are set forth more fully in my written Statement to the Committee at pp. 14-20.

Q #6. Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.

A #6. The CRS Report states that the "Pryor/Roybal bill (S. 1511/H.R. 3200) explicitly prohibits inclusion of a pension in a benefit package . . .." This is at odds with ERISA.

Integration of pensions with other benefits is a well-recognized method of fairly providing post-employment income to employees. As the Supreme Court observed in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), holding that ERISA does not prohibit the deduction of workers' compensation payments from pension benefits, "integration" is:

> a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514.

Numerous federal courts have upheld various forms of benefit integration under ERISA. See, e.g., Spitzler v. New York Post Corporation, 620 F.2d (2d Cir. 1980)(deduction of present value of pension account from severance pay calculation does not violate ERISA); Leary v. Western Union Telegraph Company, 570 F. Supp. 1384 (S.D.N.Y. 1983)(same). See also Vintilla v. U.S. Steel Corp. Plan for Employee Pension Benefits, 606 F. Supp. 640 (W.D. Pa. 1985), aff'd without opinion, 782 F.2d 1033 (3d Cir.), cert. denied, 475 U.S. 1141 (1986)(pension plan did not violate ERISA by setting off severance benefits paid pursuant to Venezuelan law).

Q #7. In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown or layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door form of mandatory retirement?

A #7. The fundamental misconception here is that retirement-eligible employees who are terminated as a result of a plant closing and begin receiving their retirement benefits are being "involuntarily retired" due to their age. This is not the case. In a plant closing situation, all employees are terminated, regardless of age. The fact that some of these employees are eligible for retirement benefits is not relevant, as it would be if employees were forced to retire from a going concern upon reaching a specified age.

After a plant closing or reduction in force, retirement-eligible and ineligible employees alike are faced with the prospect of seeking new employment, if they choose to do so. Retirement-eligible employees have a choice, since they have the continued assurance of a lifetime income. If they choose, nevertheless, to look for a new job, the fact that they are receiving retirement benefits will not impede the search. Thus, unlike a mandatory retirement situation, the employer has not prevented any employee from working on the basis of age.

When an employer shuts down a plant, none of the employees will continue to work, whether or not they are eligible for retirement. Employers and unions negotiate the benefits the employees will receive in the event of a layoff. Many contracts provide a package to retirees that includes various benefits, such as: enhanced retirement payments that begin prior to normal retirement age; life insurance; retiree health insurance; post-death continuation of benefits to spouses; and other benefits.

Laid off individuals who cannot receive retirement pay are provided for in another fashion. Since these employees will not have any further relationship with the company, they usually are paid a lump sum.

This situation has nothing to do with voluntary or involuntary retirement. It has to do with permitting employers to have sufficient certainty and flexibility to be able to provide the most benefits with limited resources.

Q #8. A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you agree with this assertion? If not, state what you believe are the other real issues. Please state the basis for your answers in detail.

A #8. The pension/severance integration issue is perhaps the most important issue before Congress. It raises policy questions that have never been addressed by Congress before. Whether the EEOC's position is good public policy should be placed directly at issue. The policy considerations on these questions are set forth in detail in my written statement to the Committee at pp. 14-20.

The benefits integration issue is a very real concern, but by no means the only issue raised by the proposed legislation. S. 1511 requires an absolute cost defense even for benefit plans that now comply with the EEOC's Interpretative Bulletin, thus raising many additional issues. Other issues include, but are not limited to:

a) Whether the proposed legislation would prohibit any age-based restrictions in voluntary early retirement incentives;

b) Whether the proposed legislation as drafted would prohibit the use of any age factors, such as "normal retirement age," in benefit plans;

c) Whether the proposed legislation would prohibit Social Security supplements offered as early retirement incentives;

d) Whether the proposed legislation would prohibit the use of Social Security "offset" provisions in pension plans;

e) Whether the proposed legislation would prohibit or restrict the use of actuarial tables in calculating benefits;

f) Whether the proposed legislation would prohibit the integration of disability and normal retirement benefits;

g) Whether the cost justification defense would permit the use of group data;

h) Whether cost justification should be an exclusive defense to age-based differentials in employee benefits;

i) Whether the proposed legislation should apply retroactively;

j) Whether the burden of proof should be placed on the employer or on the individual challenging a benefit plan.

RESPONSES OF DOUGLAS MCDOWELL TO QUESTIONS FROM SENATOR GRASSLEY ON S. 1511

QUESTIONS FOR DOUGLAS S. MCDOWELL

Q #1. There is a kind of Alice in Wonderland quality about some of the discussion of Section 4(F)(2) which has occurred in the wake of the Betts decision. On the one hand, defenders of the Betts decision describe Section 4(F)(2) as "illogical, impractical, and harmful to most employees." On the other hand, critics of the Betts decision argue that this provision represents the settled understanding which has governed employee benefit plans for twenty years.

Although there is not necessarily a contradiction between these points of view as I have stated them, the defenders of the EEOC Bulletin do seem to be asserting that Section 4(F)(2) of the Bulletin is widely adhered to by employers and that there is no great groundswell of opposition to them.

What is the EEAC's view of this difference of opinion?

Is Section 4(F)(2) widely adhered to by employers?

Is there great discontent with them among employers? What evidence would you cite for your views on this?

A #1. The question apparently is a reference to the legal dispute over the EEOC's interpretation of the ADEA that does not permit employers to integrate pension and retirement benefits into the "benefit package" approach. EEAC's position on these issues is set forth fully in its Supreme Court brief in EEOC v. Westinghouse, its 1988 comments in response to the EEOC's ANPRM on employee benefits, and in letters regarding S. 1511 sent to Senator Metzenbaum and EEOC Vice Chairman R. Gaull Silberman. Copies of those documents have been provided previously to Senator Grassley.

As to employers' concerns, S. 1511 and H.R. 3200, which would mandate that any benefit differentials based on age be justified by specific cost data, have the potential to disrupt the majority of existing employee benefit plans. Some plans contain age-based factors for a variety of legitimate reasons which are not susceptible to specific cost justification. Others coordinate a number of benefits designed to accomplish different goals for employees with different needs. Still others help employers make necessary workforce reductions by providing valuable early retirement incentives to older workers. Many of these plans are the product of collective bargaining. S. 1511 and H.R. 3200, by outlawing age factors absent individualized cost justification, will undermine the basic structures of these valuable employee benefit plans.

Q #2. Critics of S. 1511 argue that it would prohibit "integration" or "coordination" of employee benefits. To what extent is "integration" of different employee benefits, such as severance pay and retirement pay, or disability pay and retirement pay, as in the Betts case, now common?

A #2. As explained in detail in my answer to Senator Pryor's Question 4, the law on the integration of benefits was substantially at odds with the EEOC's interpretation. Surveys show that about 40% of collectively bargained plans provide pension benefits for eligible employees and severance pay to those who could not qualify for a pension. See Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts, (BNA) No. 144 at 53:4 (April 6, 1989).

The September 25, 1989, Congressional Research Service Report stated:

> To allow inclusion of a pension benefit would constitute a change in the policy that existed before the Betts decision; disallowing inclusion of a pension would render unlawful many existing employee benefit plans that have been operating in noncompliance with the Interpretive Bulletin (some of which have been in litigation).

Report at CRS-5. CRS also noted that "these arrangements, which are often collectively bargained, attempt to balance the financial hardships caused by layoffs and plant closings with limited financial resources." Id.

The September 21, 1989 letter from the United Auto Workers to the House Committee Chairmen explained that the UAW had "negotiated integrated benefit programs with many companies" and that the bill "should be amended to expressly permit integrated benefit programs." Other union contracts would be similarly affected.

As the CRS Report stated: "These issues are very complex and need further study." Report at CRS-1.

Q. Would the bill prohibit such practices?

A. The bill would incorporate the "benefit package" provision of EEOC's Interpretative Bulletin which states that "a benefit package approach shall not apply to a retirement or pension plan." 29 C.F.R. § 1625.10(f)(2)(ii). The September 25, 1989, Congressional Research Service Report states: "The Pryor/Roybal bill (S. 1511/H.R. 3200) explicitly prohibits inclusion of a pension in a benefit package."

Q. How would the "benefit package" provisions of 4(F)(2) of the Bulletin bear on this question?

A. As noted in the previous answer, by incorporating the EEOC's Interpretative Bulletin, H.R. 1511 prohibits the integration of pension and severance benefits.

Q #3. As you probably know, critics of S. 1511 believe that the inability of employers to integrate certain types of benefits would result in increased costs to employers. In your view, would S. 1511 result in increased costs to employers?

If so, what would their likely reaction be?

A #3. S. 1511 would require employers who pay post-employment income to former employees through the retirement system to also pay those individuals an amount equivalent to the severance pay provided to individuals who are not entitled to retirement payments. As the September 21, 1989, letter of the United Auto Workers states, the bill "will simply permit a small group of workers to 'double dip' at the expense of all workers and retirees." Letter at p. 2. To the extent that employers are unable or unwilling to increase their total benefit costs, many will find it necessary to either drop severance pay altogether or cut back on the levels of other benefits in the package.

Employers and Unions are not alone in making this conclusion. As the district court noted in EEOC v. USX Corporation, 10 Empl. Benef. Cases 2341, 2346 (E.D. Pa. 1989):

> Although I am compelled to follow the law as set forth in Westinghouse III, EEOC's position causes no little concern for the plight of employees subject to layoff in

> the future. Since layoffs are usually the result of employers' cost-cutting measures in years of economic decline, USX may simply decide it cannot afford both the present rate of pensions plus severance and terminate all severance pay.

Q #4. I would like you to comment on the distinction between a "safe harbor" and an "exclusive means" application of the "equal cost" rule of 4(F)(2). As I understand it, the court argued that the original version of the "equal cost" rule was not intended to be an exclusive way of escaping classification as a subterfuge.

Can you elaborate on this distinction for me, and does EEAC have a position on this issue?

A #4. Essentially, a "safe harbor" offers an example of one method of compliance which an agency can be relied upon to accept. It does not establish an exclusive defense. The EEOC I.B. offers several "safe harbors" setting out specific employer actions which it will accept as permissible under the cost justification defense. These include the use of cost data in five-year age brackets to support reductions in life insurance benefits and a "safe harbor" for long-term disability plans which (1) cease benefits at 65 for any employee who becomes disabled before age 60 and (2) cease benefits after five years for any employee who becomes disabled after age 60.

As originally created, the cost justification defense was itself a "safe harbor" and offered employers one method of showing that an age-based benefit differential was not a subterfuge to evade the ADEA. As the Supreme Court found in Betts, however, the 1979 changes to the I.B. attempted to convert cost justification from a safe harbor to an exclusive defense. This was one of the reasons the Court invalidated the EEOC interpretation.

A full discussion of the specific safe harbors found in the I.B. is set out in EEAC's comments on the EEOC's 1988 ANPRM on employee benefits. A copy of those comments has been provided previously to Senator Grassley. As noted in those comments, in 1988 it appeared that the EEOC was considering abolishing or amending the specific safe harbors in the I.B., and EEAC's comments argue in favor of preserving the existing safe harbors.

However, neither cost justification nor the specific safe harbors in the I.B. should be established as an exclusive defense. Other legitimate reasons also should suffice. For example, an employer may have a legitimate reason for limiting early retirement incentive programs for persons within certain age brackets. The reasons may be based on valid non-cost factors, such as a desire to limit the number of persons who elect to retire. For a fuller discussion, see my written statement to the Committee at pp 7-14.

Q #5. Some are concerned that enactment of S. 1511 would limit the scope of collective bargaining with respect to employee benefits.

Are you able to say what the effect of S. 1511, if enacted, on the scope of collective bargaining of S. 1511 would be?

A #5. Collectively bargained employee benefit plans that integrate pension and severance benefits are common in American industry. For example, about 40% of collectively bargained plans provide pension benefits for eligible employees and severance pay to those who could not qualify for a pension. See Basic Patterns: Income Maintenance, Collective Bargaining Negotiations and Contracts, (BNA) No. 144 at 54:4 (April 6, 1989).

My experience with this issue indicates that this is a problem of nationwide concern that involves bargaining agreements in many industries, including steel, electronics, auto, oil, rubber, telecommunications, canning and meatpacking. Employers in those industries are concerned that if they have to pay post-retirement income to retirees by both severance and retirement pay, they may have to renegotiate the benefit package with the union. As noted above, the UAW shares this concern.

Q. Does EEAC have a position on whether there should be an exception in the legislation for collectively bargained plans?

A. EEAC neither endorses nor opposes legislative proposals. However, unionized and non-unionized employers share the same concerns about the negative effect of not permitting the integration of retirement and pension benefits into the benefit package approach. EEAC's briefs filed in opposition to the EEOC's position were filed on behalf of all its members, and not only on behalf of its members with collective bargaining agreements. It would appear, therefore, that if a benefit plan provision is lawful when located in a collective bargaining agreement, it should be no less lawful when included in a plan maintained by a non-union employer.

Q #6. According to a letter to Senator Pryor and Committee Members from the Public Employees Retirement System of Ohio, some 35 states have benefit plans which integrate disability and retirement benefits, and have done so for decades. They argue that the retroactivity provisions of S. 1511 would seriously disrupt those programs, would raise potential past liability, and uncertainty as to how and when the plans could be redesigned.

Can you comment on their concerns?

Are such concerns sufficiently valid, in your view, to suggest that the application to pre-ADEA plans should be reconsidered?

What about the fact that these are public plans developed through administrative and legislative processes of state governments? Should that have any bearing on whether S. 1511, if enacted, should apply to them?

A #6. I do not represent public employers. The Ohio letter speaks for itself and lists many concerns which should be given serious consideration by the Committee. As the Congressional Research Service Report indicates, "[t]hese issues are very complex and need further study." Report at CRS-1.

Q #7. Would private plans in force prior to enactment of the Age Discrimination in Employment Act also experience disruption comparable to that Ohio claims it and the 35 other states would experience?

Do you have any idea how many private plans would be effected by this provision?

A #7. See the answers to Questions 3 and 5 above.

QUESTION ON ROLE OF ERISA IN BENEFIT PLAN REGULATION

Q #8. In testimony last week on this matter before committees of the House of Representatives, it was stated that ERISA already provides extensive protections for employee benefits.

Are you able to comment on the relationship of benefit plan protections for employers in ERISA to the Age

Discrimination in Employment Act protections we are discussing today?

A #8. The CRS Report states that the "Pryor/Roybal bill (S. 1511/H.R. 3200) explicitly prohibits inclusion of a pension in a benefit package . . . ." This is at odds with ERISA.

Integration of pensions with other benefits is a well-recognized method of fairly providing post-employment income to employees. As the Supreme Court observed in Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), holding that ERISA does not prohibit the deduction of workers' compensation payments from pension benefits, "integration" is:

> a calculation practice under which benefit levels are determined by combining pension funds with other income streams available to the retired employees. Through integration, each income stream contributes for calculation purposes to the total benefit pool to be distributed to all the retired employees, even if the nonpension funds are available only to a subgroup of the employees.

451 U.S. at 514.

Numerous federal courts have upheld various forms of benefit integration under ERISA. See, e.g., Spitzler v. New York Post Corporation, 620 F.2d (2d Cir. 1980)(deduction of present value of pension account from severance pay calculation does not violate ERISA); Leary v. Western Union Telegraph Company, 570 F. Supp. 1384 (S.D.N.Y. 1983)(same). See also Vintilla v. U.S. Steel Corp. Plan for Employee Pension Benefits, 606 F. Supp. 640 (W.D. Pa. 1985), aff'd without opinion, 782 F.2d 1033 (3d Cir.), cert. denied, 475 U.S. 1141 (1986)(pension plan did not violate ERISA by setting off severance benefits paid pursuant to Venezuelan law).

ERIC

The
ERISA
Industry
Committee

October 23, 1989

By Hand

The Honorable David Pryor
Chairman
Special Committee on Aging
SD-G41 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Howard M. Metzenbaum
Chairman
Subcommittee on Labor
Committee on Labor and Human Resources
SD-428 Dirksen Senate Office Building
Washington, D.C. 20510

Re: S.1511 and S.1293

Dear Senators Pryor and Metzenbaum:

In accordance with your request, I am enclosing my responses to the additional questions that Senators Pryor and Jeffords raised regarding my testimony on S.1511 and S.1293.

Thank you for the opportunity to testify at the joint hearing on September 27th and for the opportunity to respond to the questions that have been raised.

Sincerely,

James D Short

James D. Short

Enclosures

cc: Senate Aging Committee Members
Senate Labor Subcommittee Members

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Responses of James D. Short to
Post-Hearing Questions Raised
by Senator Jeffords
Regarding S.1511 and S.1293

1. The EEOC has not previously taken the position that the use of actuarial assumptions and tables in the computation of employee benefits constitutes a violation of the ADEA. Do you expect that one consequence of the passage of either bill in present form will be a change in this position on the part of the EEOC? Do you believe that these bills will make it unlawful for benefit plans to continue to use actuarial computations? Please explain.

It is our understanding that, in fact, the EEOC has taken the position that the ADEA prohibits the use of actuarial calculations to reduce severance pay by the present value of retirement benefits. *See* EEOC brief in *Abenante* v. *Fulflex, Inc*. (1st Circuit) Nos. 89-1179 and 89-1180, at pages 15-16.

Since S.1511 and S.1293 appear to be designed to uphold the position that the EEOC has taken in *Fulflex* and other similar cases, the courts might construe the bills to endorse the position that the EEOC has taken in *Fulflex* with respect to the use of actuarial calculations. Any legislation that Congress enacts should make clear that plans may continue to calculate benefits (including benefit offsets) on the basis of actuarial calculations.

2. Do you believe that the retroactive application of S.1511 will have any impact on the statute of limitations applicable to ADEA claims? If so, who, if anyone, will be unfairly advantaged or disadvantaged by this aspect of the bill?

S.1511 does not amend the ADEA's statute of limitations, and we are not aware of any persuasive reason for amending the statute of limitations. Any individual who has a grievance against an employer has ample time under the ADEA to file a charge against the employer. The statute of limitations is designed to protect employers against stale claims, and the Congress should not resurrect stale claims against employers who are protected by the current statute of limitations.

In any event, if Congress chooses to change the law, it should do so only on a prospective basis. If the legislation is solely prospective in its application, there will be no need to amend the statute of limitations.

3. Do you have knowledge or reason to believe that substantial numbers of benefit plans were in non-compliance with the EEOC IB prior to the Betts decision? Please explain in detail.

Major employers believe in the principles expressed in the ADEA and attempt to comply with all of the ADEA's requirements. However, employers are required to comply with the EEOC's guidelines only to the extent that the guidelines adopt a correct interpretation of the ADEA.

Prior to the Betts decision, the state of the law regarding the application of the ADEA to employee benefits was unsettled. A number of judicial decisions indicated that the EEOC's interpretive bulletin did not represent a correct interpretation of the law. As a result, many employers provided benefits that did not comply with the view of the law espoused by the EEOC. Many of these plans are maintained in accordance with union-negotiated collective bargaining agreements. For example, a recent survey indicates that approximately 40 percent of the collectively-bargained plans surveyed deny severance pay to employees who are eligible for an immediate pension. See Bureau of National Affairs, Basic Patterns: Income Maintenance, at 53:3 (April 6, 1989). Similarly, the United Auto Workers ("UAW") has recently voiced its concern that H.R.3200 would prohibit integrated severance or supplemental unemployment benefit plans and pension plans, which the "UAW has negotiated . . . with many companies."

In addition, the EEOC itself has conceded that, notwithstanding its Interpretive Bulletin, the ADEA does not prohibit certain voluntary early retirement window plans that impose age limitations based on legitimate business reasons, even though the age limitations cannot be cost-justified under the Interpretive Bulletin. It is reasonable to believe that many employers have designed early retirement window plans on the basis of the EEOC's statements regarding early retirement window plans, rather than on the basis of the EEOC's interpretive bulletin.

4. Are you aware of any companies which have terminated severance pay or other benefits because they were not permitted to integrate them with pension benefits? If so, identify the companies and state the particulars of each situation to the extent known.

This question is based on the assumption that an employer is not permitted to integrate severance benefits with pension benefits. We question the validity of that assumption. Prior to Betts, a substantial body of case law permitted the integration of severance and retirement benefits, and, as explained in the answer to the preceding question, many employers provided coordinated benefits under integrated severance and pension plans.

Although we are not in a position to identify any companies that have terminated their severance plans in response to the EEOC's litigation position, it is reasonable to believe that if a company wished to avoid the risk of litigation with the EEOC, the company would either terminate its severance plan or provide a lower level of severance or pension benefits (or both) than it would if it integrated its severance and pension plans. An employer has a limited budget to devote to employee benefits. If an employer decides to provide severance benefits to pension-eligible employees in order to avoid litigation with the EEOC, it is reasonable to anticipate that the overall level of severance benefits or pension benefits (or both) will be reduced in order to compensate for the cost of providing duplicate benefits to the older workers.

5. In what ways, positive or negative, may employers be compelled to change employee benefit plans as a result of the passage of these bills?

A great many benefit plans currently include integration provisions that are designed to coordinate such benefits as severance and layoff benefits, unemployment benefits, disability benefits, and retirement benefits. If a new law prevents employers from treating retirement benefits and severance benefits, for example, as part of a coordinated and integrated "benefit package," employers are likely to reduce the level of severance benefits, pension benefits, or both. An employer has limited resources to devote to employee benefits. If the employer is required to provide full severance benefits for employees who are pension-eligible, the employer doubtless will compensate for the additional cost by reducing the overall level of the severance benefits, by reducing the value of the pension benefits that accrue in the future, or both.

In addition, as the EEOC has recognized, the bills prohibit the use of reasonable age limitations in voluntary early retirement incentive programs. If the bills are not clarified to permit the use of age limitations in voluntary early retirement programs, employers may be required to reduce the benefits that they offer through voluntary early retirement programs and may thereby be forced to rely more heavily on *involuntary* programs in reducing their workforces.

6. *Is there anything in either of these bills which is incompatible with the treatment of employee benefit plans under ERISA, the Internal Revenue Code or any other provision of law? If so, please explain in detail.*

ERISA encourages employers to provide employee benefits equitably and efficiently. The use of an integrated benefit package approach to coordinate such benefits as severance pay or disability benefits and pension income enables an employer to allocate its limited resources to provide employee benefits in an equitable and efficient manner. The Supreme Court has recognized that when Congress enacted ERISA, Congress intended to allow an employer to integrate its retirement plan with other benefits funded by the employer. The "congressional purpose [of] promoting a system of private pensions by giving employers avenues for cutting the cost of their pension obligations . . . underlies all such offset possibilities." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 517 (1981). By prohibiting the inclusion of pension benefits in a "benefit package" approach, the bills subvert ERISA's objective of promoting equitable and efficient plan design.

7. *In the normal sequence of events, assuming the continued existence of a job and the continued ability to perform it, it is the employee who determines when (s)he will commence receiving retirement or pension benefits. Thus, even after reaching retirement age the employee could not be compelled to retire if (s)he chose to continue working, and no retirement benefits would be payable to that employee until actual retirement. Given these facts, why then in a shutdown layoff situation should an employer be able to compel an employee to commence retirement rather than opting to take the severance pay available to other employees? Isn't the effort to integrate severance pay with pension benefits merely a "back door" form of mandatory retirement?*

The benefit package approach does not subject an employee to mandatory retirement. In a plant closing or layoff, it is the plant closing or layoff that causes the employees to be terminated. The employee then chooses whether and when to receive retirement benefits. The employer's benefit plans do not mandate retirement.

Following a plant closing or layoff, a retirement-eligible employee has the advantage of being eligible to receive an immediate pension. His eligibility to receive a pension is hardly a form of mandatory retirement; it is a valuable immediate benefit that gives the employee an income stream on which he may rely. Moreover, unless the pension-eligible employee has reached the plan's normal retirement age, ERISA does not permit the plan to require the employee to begin receiving his pension. Thus, the benefit package approach does not interfere with the employee's retirement decision.

Under the benefit package approach, a laid off employee who is not pension-eligible may receive severance pay. By providing these employees with severance pay, the employer allocates its employee benefit dollars to those with the greatest need: the laid off employees who are not pension-eligible.

8. A number of witnesses stated at the hearing that the real issue involved with this legislation is whether ADEA should prohibit integration of severance pay with pensions and the policy questions surrounding that determination. Do you agree with this assertion? If not, identify what you believe are the other real issues. Please state the basis for your answers in detail.

The ability of an employer to integrate severance pay with pension income is a central issue. However, the issue is not limited to severance pay. As explained in our written testimony, the benefit integration issue also involves such benefits as layoff benefits, supplemental unemployment benefits, and disability benefits. In addition, as our written testimony points out, the bills raise the question whether voluntary early retirement incentive plans are permissible under the ADEA.

Responses of James D. Short to Post-Hearing Questions Raised by Senator Pryor Regarding S.1511

1. Mr. McCarthy has testified that UNUM's clients have had no problem in living with the equal benefit or equal cost regulation. How are UNUM's clients different from the employers you speak of who absolutely will not be able to continue to offer employee benefits under S.1511?

Mr. McCarthy did not substantiate his testimony with supporting data and information. In any event, Mr. McCarthy's testimony addressed only the subject of long-term disability insurance. He did not address either the treatment of voluntary early retirement incentive programs or the benefit package approach.

We did not testify that employers will not be able to continue to offer employee benefits under S.1511. We have testified, however, that S.1511 would jeopardize the ability of an employer to offer a voluntary early retirement incentive plan. We also testified that if S.1511 is enacted, and employers are prevented from treating retirement benefits as part of a "benefit package," many employers will be required to reduce the benefits they provide under their severance, layoff, disability, and similar plans in order to absorb the cost of complying with S.1511.

2. Do you feel that what happened to Mr. Sousa was fair, and why?

Because we are not familiar with all of the details of Mr. Sousa's case, it is inappropriate for us to comment on his particular situation. However, we certainly do think it is fair for an employer to provide older employees with a package of benefits, including retirement benefits, that has a value that equals or exceeds the value of the benefit package provided to younger employees. An employer that provides this kind of benefit package does not discriminate against older workers.

3. Do you feel that what happened to June Betts did not constitute age discrimination, and why?

Because we are not familiar with all of the facts involved in Ms. Betts' case, we will not comment on the merits of that case. However, as explained in our written testimony, we do think that it is appropriate for an employer to be able to integrate its disability and pension plans under the "benefit package" approach.

4. Why do you feel that planning techniques which were illegal prior to Betts, such as integration of pension and severance plans, should be allowed after S.1511 becomes law?

We do not agree with the premise that the integration of pension and severance plans was illegal prior to the Supreme Court's decision in Betts. The Supreme Court's decision in Betts makes clear that many sensible and logical benefit arrangements, including integrated pension and severance plans, are lawful now and were lawful prior to Betts. This conclusion is consistent with a substantial number of federal court decisions that were handed down before the Supreme Court decided Betts. See Britt v. E.I. DuPont de Nemours & Co., 768 F.2d 593 (4th Cir. 1985); Parker v. Federal Nat'l Mortgage Ass'n, 741 F.2d 975 (7th Cir. 1984); Abenante v. Fulflex, Inc., 701 F. Supp. 296 (D.R.I. 1988); Khan v. Grotnes Metalforming Systems, Inc., 679 F. Supp. 751 (N.D. Ill. 1988); EEOC v. Firestone Tire & Rubber Co., 650 F. Supp. 1561 (W.D. Tenn. 1987).

Most employers and unions try to maintain plans that comply with the law. The fact that a large number of employers and unions negotiated benefit plans that integrate with one another strongly indicates that many employers and unions believed that the law permitted benefit integration.

Congress itself has enacted legislation that requires the pension and severance benefits of federal employees to be integrated. If benefit integration is appropriate for federal employees, it is equally appropriate for employees in the private sector. See 5 U.S.C. § 5595(a)(2)(B)(iv); 10 U.S.C. §§ 1174(e), (h), & 1186; 14 U.S.C. §§ 286(b), 286a(d), 327(b); 33 U.S.C. § 853h(e).

In designing their benefit plans, employers attempt to deliver benefits to their employees in a coordinated system that efficiently and equitably allocates the available resources. For example, many employers maintain a pension plan to provide their long-service employees with retirement income and a severance plan to provide immediate financial assistance to short-service employees who are permanently laid off. In many instances employers limit eligibility for severance pay to employees who are not eligible for an immediate pension, reduce the amount of the severance benefit by the value of the pension benefit, or reduce the amount of the pension by the amount of severance paid. Severance programs are not designed to be additive to pensions but are structured to provide benefits to those employees who are not eligible for pensions or who will not receive pension payments until many years in the future.

Defined benefit pension plans, by design, favor long-service employees by making them entitled to receive immediate early retirement pensions if they suffer job loss through lack of work or disability. Severance pay provides funds to those with insufficient service or age to receive immediate pensions. For example, it seems eminently fair, logical, and equitable to pay severance benefits to an employee who is laid of at age 45 with 20 years of service, but who is not eligible for an immediate pension, *and* to pay less or perhaps even no severance benefits to another 20-year employee who is laid off at age 65, with a right to receive an unreduced pension beginning immediately. The severance pay is designed to give a limited pool of funds to the first employee to hold him over while he searches for new employment. By contrast, the employee who is eligible for an immediate pension has available a stream of income over his remaining life.

5. *Do you feel that it is fair for a small group of employers to be able to take advantage of the Supreme Court's mistaken interpretation of congressional intent simply because they happened to be sued at the right time*?

We do not accept the characterization of the Supreme Court's interpretation as "mistaken." As of now, the Court's *Betts* decision represents the law of the land. Nor do we accept the implication that a "small group of employers" has "taken advantage" of anything. As explained in our written testimony, we believe that a great many employers (not just those who are currently involved in litigation with the EEOC) maintain integrated benefit plans that fully comply with the letter and spirit of the ADEA. As we have testified, we think that *all* employers should be permitted to maintain voluntary early retirement incentive plans and to coördinate pension benefits with the severance, layoff, disability, and other similar benefits that they provide.

In any event, we think that if Congress decides to amend the ADEA, the amendment should be purely prospective in ts application. Those employers whose arguments have been pheld by the Supreme Court in *Betts* should be protected by he Court's decision. The integrity and effectiveness of our egal system depends upon the willingness of all parties to cept the finality of the Supreme Court's judgments.